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Public Utilities Commission of the District of Columbia

P. U. C. No. 3305, Formal Case No. 316

In the Matter of INVESTIGATION OF RATES, TOLLS, CHARGES, TARIFFS, RULES, REGULATIONS, AND CONDITIONS OF SERVICE OF THE WASHINGTON GAS LIGHT COMPANY

Commissioner HANKIN, dissenting: [1]

I dissent from the opinion and order of the Commission on four main grounds:

(1) The order of the Commission is in utter disregard of, and contrary to, the Act of October 2, 1942, amending the Price Control Act;

(2) In this proceeding, the Commission has so far departed from the usual course of administrative proceeding, and has so disregarded the rules of proper procedure, that it deprived the public of a full and fair hearing;

(3) The Commission's determination that the Washington Gas Light Company is entitled to an increase in rates is

[1] Since the Commission decided to issue its opinion and order without giving me any reasonable time in which to write my dissenting opinion, I filed a draft of my dissent under protest, reserving the right to substitute an opinion in more finished form.

In order not to delay the decision in this case, I was preparing a draft of an opinion, when on Friday, October 9th, I received the first draft of the majority opinion. This required changes in my draft. On October 12th, I received a second draft of the majority opinion containing many changes. On October 13th, for the first time, I was handed a copy of the Commission's order, making the rates retroactive to September 1st. On the same day, I was informed by the majority, that the majority opinion and order would be issued immediately, without giving me an opportunity to complete my dissenting opinion. I, therefore, hurriedly whipped my draft into shape, but had no opportunity to answer many points raised in the majority opinion, and had no opportunity to support my opinion by adequate citations of authorities. This I intended to do in my final dissenting opinion.

Upon careful reading of the majority opinion I find that little need be done to answer it. I feel that my opinion should be annotated by ample citations of authorities. Under the circumstances, however, I am filing this revised copy of my dissent without the necessary number of citations.

based upon errors in the sliding-scale arrangement and upon conclusions unsupported by the evidence in the record;

(4) With proper application of the sliding-scale arrangement, and in the light of such other facts as are pertinent to this case, the present rates should be decreased by the sum of $617,874.36.

The Price Stabilization Act

On October 2, 1942, Congress passed an Act to amend the Emergency Price Control Act of 1942, in which it was provided:

> That no common carrier or other public utility shall make any general increase in its rates or charges *which were in effect on September 15, 1942*, unless it first gives thirty days' notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase. [Italics supplied.]

On October 3, 1942, the President issued an Executive order in which he designated the Director of Economic Stabilization as the agency to receive notice pursuant to the above provision.

This Commission now issues an *order*, in which it is provided in Section 2: "That the rates, tolls, and charges *to be charged* by the Washington Gas Light Company for gas service in the District of Columbia *shall be* in accordance with the following rates, tolls, charges, tariffs, rules, regulations, and conditions of service." The rates prescribed in this order are higher than those which were in effect in the District of Columbia on September 15th, last. This order is thus contrary to an express Act of Congress.

The fact that the Office of Price Administration had intervened in this case is in no manner sufficient compliance with this Act of Congress. The history of this legislation indicates that Congress was quite well aware of the fact that the Office of Price Administration had intervened in this case. It was a matter of common knowledge, of which Congress must have taken legislative notice, that the intervention of the Office of Price Administration was beset by all types of limitations

APPENDIX TO BRIEF FOR APPELLEES JAMES F. BYRNES, DIRECTOR OF ECONOMIC STABILIZATION, AND PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, IN NOS. 8501, 8502, 8503, AND 8504

Part I

PLEADINGS AND OTHER PAPERS DESIGNATED BY APPELLEE BYRNES

in the prosecution of this case. Nevertheless, Congress enacted this statute, and a reasonable inference is that the agency designated by the President would have the right to appear before this Commission and present such facts as he may deem advisable pertaining to all matters which are involved in rate making. Therefore, the fact that an agency of the Federal Government had already participated in the hearing in this case in no way absolves this Commission from its duty of holding up any order increasing rates until the Director of Economic Stabilization will have had his thirty days' notice and an opportunity to intervene.

In Section 3 of its order, the Commission also prescribes that "under the terms of the sliding scale arrangement, the rates, tolls, charges, rules, regulations, and conditions of service herein prescribed *became effective as of September 1, 1942.*" If, by this, it is intended to make the order retroactive so that the rates might be said to have been in effect on September 15, 1942, the violation of the statute is so much the worse. The Commission thus provides the Company with a means of evading the law. To me this is shocking, although not surprising in view of other circumstances attending this case, as will appear from this opinion.

The Nature of the Proceeding

This is an annual rate hearing under the sliding-scale arrangement with the Washington Gas Light Company, instituted in 1935. In utility and Commission circles it is generally referred to as a routine hearing. The Commission's accountants audit the books of the Company, pick out a few small items for suspension, a hearing is held on these few items, and a mathematical formula is applied fixing the rates for the next year. If any substantial questions arise, they are either kept "pending" [2] or are set aside as being not within the "scope" of the hearing.

[2] The order of investigation, instituting the 1941 proceeding under the sliding scale, provided: "Section 2. That an investigation be made relative to the rate of return to be allowed the Washington Gas Light Company on its property used and useful for the convenience of the public." Although that was part of the investigation for the purpose of setting the rates for

Prior to the hearing in this case, which was set for August 18, 1942, the Commission and the Company had a prehearing conference on August 14th. At this conference the Commission's staff raised questions as to a number of relatively small items, and I also raised a number of questions. The latter questions related to the rate base and various items included in "operating expense."[3] Immediately, the Company took the position that, if such major questions were to be considered, the Company would not be prepared for the hearing set on August 18th. It stated that it would require some sixty days in which to prepare for the hearing. The Commission was also unprepared to go into these major questions. As the then Chairman of the Commission,[4] I granted a continuance of sixty days and nothing to the contrary was stated by either of the other Commissioners who were present. On the following day, however, the Commission, for reasons inexplicable to me, but now quite understandable, decided that the hearing was to take place on August 18th, although neither side was prepared to go into the important questions which will be treated in this opinion.

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the period of September 1, 1941, to August 31, 1942, the subject of the rate of the return was not touched upon at the hearing. The only issue at the hearing was an item of about $1,200 contributed by the Washington Gas Light Company to the Greater National Capital Committee. It is explained that the question pertaining to the rate of return is still one of the items "pending investigation," although nothing whatever has been done by the Commission or its staff by way of "investigating."

[3] The questions I raised were by no means the result of a careful analysis of the data. They were merely the result of a cursory review of the exhibits prepared by the accounting staff. The first glimpse any of the Commissioners had into the figures relating to the proceeding was on August 13th, the day before the prehearing conference. Prior to this date, none of the elements which entered into the rate determination had been discussed by the Commissioners, either among themselves or with the staff, except the item of "Salaries of Officers and Executives," when several months before a question was raised why this item was omitted from the Commission's annual reports, as is required by our statute.

[4] Three days later, the other two Commissioners elected Commissioner Flanagan as Chairman, as of September 1, 1942. This explains why the first part of the hearing was conducted under my Chairmanship, and the latter part under Commissioner Flanagan's Chairmanship; also the reference to Commissioner Flanagan throughout this opinion as the "present Chairman."

It has been intimated by the Company in the course of the hearing, as also by the press in both the news and editorial columns, that it was "unfair" to raise these major questions at a time when the Company was applying for an increase in rates under the sliding-scale plan, after a number of reductions in rates had been effected through this plan in the previous years.[5] The argument resolved itself into a complaint that the sliding-scale plan should work "both ways," and the impression given was that these major questions were raised in order to avoid an increase under the sliding-scale plan. The complaint against my raising the major questions, however, was merely a smoke-screen to hide the real issues involved under the sliding-scale plan itself. The same questions would have been raised, had the computation shown that the rate payers were entitled to another reduction in rates this year. If there is any "unfairness," it lies not in my having raised these questions, but in the fact that these questions had not been raised in previous years. There is no telling by how much the rates should have been reduced, had these questions been raised and properly determined.

The Company has also intimated that, if questions of a major character were to be raised, it should be given an opportunity to terminate its "agreement" to be bound by the sliding-scale plan upon ninety days' notice, in accordance with Finding No. 3, Order No. 1458, issued December 13, 1935, which embodied the sliding-scale arrangement.

The Company's understanding of its "rights" under the sliding-scale arrangement is entirely erroneous. It treats of the arrangement as an "agreement" between the Commission and the Company. "We have an agreement with the Commission and we simply come in, together with the Commission's staff, and say the figures under the sliding-scale arrangement which has been established by the Commission results in so and so; that is all there is to it," says Counsel for the Company. Yet, the sliding-scale arrangement lacks all elements of an agreement. It was not an agreement entered into by the

[5] The total reductions in rates, since the adoption of the sliding-scale plan amounted to $328,000; the rate increase sought by the Company this year is over $381,600.

parties concerned, but an *order*, in which the Commission set for itself a formula to follow in future rate determinations. True, the sliding-scale arrangement was an order in which the Company acquiesced. This order, however, like any order of the Commission, is subject to modification or termination by the Commission.

Section 1 of this order adopted the initial rates, rules, and regulations under the sliding-scale arrangement, and Section 2 provided that subsequent rates should be in accordance with the sliding-scale arrangement, or may be modified or changed *in accordance with law, and in conformity with Finding No. 3*. Assuming that the Commissioners could in 1935 thus bind either themselves or their successors as to the manner in which rates should be determined, there is nothing in these provisions which in any way diminishes the duty of the Commission to examine all elements of rate making in any rate proceeding. The effect of the above provisions is simply that changes in the arrangement should be made upon ninety days' notice, with or without prior hearing. There is nothing in these provisions which indicates that the Commission may not at any time investigate and ascertain the facts, whether finally it will or will not terminate or modify the arrangement. Assuming further, that there is anything *in this arrangement* which would absolve the Commission from its duty to determine the facts relating to all elements which enter into rate making, then this order must be held contrary to Paragraph 18 of our statute, which provides, *inter alia* that "the right to alter or amend *all orders* relative thereto is reserved and vested in the Commission, notwithstanding any such arrangement and mutual agreement".[6] Thus, if looking to the four corners of the

[6] "PAR. 18. That nothing in this section shall be taken to prohibit a public utility, with the consent of the commission, from providing a sliding scale of rates and dividends according to what is commonly known as the Boston sliding scale, or other financial device that may be practicable and advantageous to the parties interested. No such arrangement or device shall be lawful until it shall be found by the commission, after investigation, to be reasonable and just and not inconsistent with the purposes of this section. Such arrangement shall be under the supervision and regulation of the commission. The commission shall ascertain, determine, and order such rates, charges, and regulations, and the duration thereof, as may be

sliding-scale arrangement itself, there is still question as to the right of the Commission to modify or terminate, the provision of Paragraph 18 of the statute is conclusive in this regard.

In view of the above, there is no merit to the Company's contention that major questions relating to the elements of rate making cannot be raised, unless the sliding-scale arrangement is terminated upon ninety days' notice.

However, the argument that the Company should be given an opportunity to terminate the sliding-scale arrangement lacks candor, for, at the same time, the Company argued vigorously that it needed the sliding-scale arrangement; that the Company was in the process of seeking credit through the sale of preferred stock and bonds; and that the sliding-scale arrangement was a "distinct advantage." "The Company must have credit; we have got to have money," Counsel for the Company insisted. That the sliding scale, as it now operates, is a "distinct advantage" to the Company, there is no doubt. But the Company's contention only means that it must continue charging rates which otherwise might be deemed excessive simply because it is in need of additional capital. I do not think that the rate payer, whose payments are based on the entire rate base, not merely on the equity of the common stockholders, should be charged with the Company's costs of financing.

In the course of the hearing, the present Chairman emphasized that this case involves the "fairness" and "integrity" of the Commission.[1] With this I am thoroughly in accord. I should go further and say that *every* case before the Commission involves its fairness and integrity. By this I understand that the Commission must "fairly" determine all elements of fact, and must apply the law to the end that the interests *of the public and of the utility* might be fully pro-

necessary to give effect to such arrangement, but the right and power to make such other and further changes in rates, charges, and regulations as the commission may ascertain and determine to be necessary and reasonable, and the right to alter or amend all orders relative thereto, is reserved and vested in the commission notwithstanding any such arrangement and mutual agreement."

[1] The majority opinion also stresses the "fairness" and "integrity" of the Commission. Fairness and integrity should at all times be assumed.

tected. "Fairness" does not mean the blind application of a mathematical formula, without a thorough examination of the facts; "integrity" does not mean that facts should not be scrutinized, merely because they had not been scrutinized before.

It is not sufficient to make such self-serving declarations as "careful study has been given to all factors," and, at the same time, shift the entire responsibility on the staff for whatever items are called to the Commission's attention. No matter how able the staff, the responsibility is ours. It is a well-known fact that the care which will be exercised by able accountants in bringing out questionable items will generally reflect the policies of the Commission. If substantial items have been overlooked, or if the accountants merely adopt the explanations of the Company on borderline questions, the fault is not theirs, but ours. We cannot arrive at a "fair" determination of fact, when the testimony is at war with reality, merely because "the Commission cannot, collectively or individually, review the books of the Company to make a determination as to the reasonableness of every item." The requirements of "fairness" and "integrity" are not thus easily satisfied.

The Commission also adopted the Company's claim that it is in need of financing, elaborated on the proposition, and concluded that it "must weigh the necessity for an increase in rates against the broad problem of adequate service." The facts in the record do not bear out any immediate danger to the rendition of adequate service by the Gas Company on account of difficulties in financing. The records in the cases involving applications for the issuance of preferred stock show that the Washington Gas Light Company is a holding company of gas companies in nearby Maryland and Virginia, and the Company's need for financing is occasioned to a large extent by the need for expanding its plant to meet the growing demands for service outside of the District of Columbia. Had the Company's return been computed solely on the equity of the common stockholders, with allowances for interest and fixed charges, there might have been room for the argument that an additional allowance should be made to attract new

capital; not so, however, where the Company is allowed a return not only on the stockholder's own investment, but also on the investment represented by other people's money, so that the common stockholder receives a return of 10% on the market value of the stock. In such circumstances, to increase rates in order to attract additional investment would mean to charge the public with the cost of financing; in this case, it would mean to charge the District consumers with the cost of financing not only in the District of Columbia, but also in other jurisdictions. Such charges, in addition to a fair return on the property used and useful in the service within our jurisdiction, are bound to result in unreasonably excessive rates.

Our statute requires that the rates charged by any utility shall at all times be just and reasonable, and we must follow this precept laid down by the law. When we prescribe rates, whether that be under the sliding-scale plan or any other plan, we must bear in mind that we are fixing rates the people must pay for services which they cannot get elsewhere. It behooves us, therefore, to scrutinize carefully all facts pertaining to the rate-making process, lest the people be compelled to pay more than what is just and reasonable.

What is a just and reasonable rate? Under ordinary circumstances, it is a rate calculated to allow a fair rate of return to the utility on its investment. The fact that the Commission adopted a sliding-scale plan of rate determination, in no way diminishes our statutory obligation to weigh and consider all the facts or to prescribe rates which are just and reasonable.[*] That this was well recognized as part of the sliding-scale arrangement itself, is evident from the following language of the Commission when it adopted the sliding-scale plan:

> An administrative body such as the Public Utilities Commission cannot vest or divest itself of jurisdiction.

[*] Even if Paragraph 18 of our statute did not expressly reserve to the Commission the right to alter or amend all orders relative to rates, notwithstanding any arrangement or mutual agreement, and even if the sliding-scale arrangement did constitute an agreement, there would still be a question whether this Commission would have the authority to bargain away its power to fix just and reasonable rates. *Freeport Water Co.* vs. *Freeport*, 180 U. S. 587, 599.

> * * * The Commission early recognized that if any such arrangement was to be of real value it should be sufficiently flexible in its provisions to meet changing conditions in such manner as to avoid injustice to the consumers or the Companies and at the same time to permit timely benefits. To endure it must be susceptible of such modifications both as to substance and form as the facts or conditions from time to time may require.

There can be no conflict between the arrangement and the statute. Section 11 of Finding No. 2 of the arrangement itself provides that any interpretation of the arrangement, or any provision thereof, should be in conformity with the Act, and that nothing contained in the arrangement should operate to the prejudice of any interested party under said Act. It follows, therefore, that in the determination of what should, or should not, enter into rate making, the Act, and not the arrangement itself, must govern.

There is another provision in our Act which must prevail as against any formula adopted in the sliding-scale arrangement, and that is Paragraph 90* of the Act under which this Commission is charged with the duty of enforcing the provisions of the Public Utility Law, "as well as all other laws relating to public utilities." This provision throws light on the question whether the sliding scale arrangement must work equally "both ways," that is, whether there is to be a decrease or an increase in rates.

Having erroneously started with the premise that the sliding-scale arrangement is an "agreement" between the Commission and the Company, the latter made a popular appeal to the effect that the sliding-scale arrangement should work both ways. The newspapers, both in their news and editorial columns, took up this cry and completely beclouded the issue,

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* "PAR. 90. That the commission shall inquire into any neglect or violation of the laws or regulations in force in the District of Columbia by any public utility doing business therein, or by the officers, agents, or employees thereof, or by any person operating the plant of any public utility, and shall have the power, and it shall be its duty, to enforce the provisions of this section as well as all other laws relating to public utilities."

apparently on the theory that it is poor sportsmanship to have an agreement work one way but not the other.

I agree that a sliding-scale plan can be devised which, if properly applied, should work both ways *and in conformity with the Act*. The present sliding-scale arrangement, however, cannot work *equally* both ways, if the Act, and not the arrangement, is paramount. Under this plan, when the Company during any test year makes excessive profits, there is conclusive evidence of the fact that the existing rates are unreasonably high, and they should be reduced. If, however, the formula under the sliding-scale arrangement shows that the rate during the test year did not reach 6½%, then there is still a question whether the existing rates are unreasonably low or confiscatory, for it is well established law that no public utility is entitled to an increase in rates unless the existing rates are confiscatory.

In this case, the Company has not undertaken to show that the existing rates are unreasonably low. Not only has the Company neglected to show that the existing rates are insufficient, but, on the contrary, the Company asserted and insisted that it was not seeking any increase in rates, as the following demonstrates:

> Chairman HANKIN. You are asking for an increase in rates under the sliding-scale arrangement?
>
> Mr. PRETTYMAN. No. The sliding scale arrangement itself works automatically.

The entire case thus presents an anomalous situation. In ordering an increase, the Commission, in effect, says: The Company does not want an increase; the present rates are not confiscatory; but we want the consumers to pay more than they do now merely because in 1935 our predecessors arrived at a formula according to which the public should now pay more.

THE ADMINISTRATIVE PROCEDURE

When the sliding scale was adopted, $21,000,000 was set as the "initial rate base" as of June 30, 1935. Since then, the rate base has grown because of additions and betterments, until now the rate base is said to be $28,088,332 as of June 30, 1942.

The adoption of the sliding-scale plan, however, did not absolve the Commission from its duty to determine rates upon a correct rate base or to correct any inflationary elements in the rate base already adopted. Recently, upon a reclassification of the Company's accounts in accordance with the Uniform System of Accounts prescribed by the Federal Power Commission and this Commission, it became evident, upon the Company's own showing,[10] that the rate base was inflated to the extent of $1,055,549.52, being the difference between the appraised value of the Company's lands and their actual cost.

I, therefore, raised the question whether the rate base for the test year ending June 30, 1942, should not be diminished by this amount. The Company moved to strike, arguing that the question was not within the "scope" of the present hearing, that at the present time the Commission was concerned only with the rate under the sliding-scale plan, and that the question as to the proper rate base might be taken up in some other proceeding. The Commission granted this motion.

Yet, how can any reasonable rate be determined without a correct rate base? Surely the sliding-scale plan does not contemplate that we multiply the errors of the past. If it does, then the plan is in direct conflict with our statutory duties, and, therefore, invalid. The answer is simple. Neither under the sliding-scale plan nor under any other plan of rate making can it be said that the correctness of the rate base is without the scope of the rate determination. In these circumstances, I am of the opinion that the rate base for the purpose of determining the proper rates under the sliding-scale plan should now be diminished by $1,055,549.52.

The ruling of the Commission sustaining the motion to strike the above question, as also its rulings in the course of the proceeding, sustaining objections to information sought by one of the Commissioners, raises a question by far more important than the amount at issue in this proceeding. It brings into issue the propriety of the proceeding itself. Is it within the

[10] If the experience of other natural gas companies is a criterion, the Federal Power Commission will undoubtedly find additional items for disallowance from the cost claims of the Washington Gas Light Company.

proper function of the Commission to rule out questions asked by one of the Commissioners?

When a question is asked by counsel, and objection is raised by opposing counsel, the objection is, in substance, an appeal to the Commission for a ruling that the information sought is irrelevant to the proceeding. If the Commission finds that the information is irrelevant, it sustains the objection. In practice, such objections are sustained in administrative proceedings only if it is evident that the information sought would not be relevant to any plausible theory upon which the case may be decided.

In a proceeding now pending jointly before the Federal Communications Commission and this Commission,[11] we find an excellent illustration of this rule of admissibility of evidence in administrative proceedings. There I suggested an interpretation of a provision in the Federal Communications Act which, if adopted, would make a large part of the respondents' testimony irrelevant to the determination of the case. The respondents argued for a different interpretation. When the respondents introduced voluminous evidence based on their interpretation of the statute, Counsel for the Federal Communications Commission moved to strike, and, on my own suggestion, the objection was withdrawn.[12]

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[11] In the Matter of Telephone Charges of Hotels, Apartment Houses, and Clubs on Interstate and Foreign Telephone Communications. F. C. C. Docket No. 6255, P. U. C. Formal Case No. 311.

[12] "Mr. COHEN. I move at this time that all the testimony of Mr. Crunden and of Mr. Larkin on Thursday and of Mr. Florance be stricken from the record, and all the exhibits produced in connection with the testimony of those three witnesses, I move that that not be admitted into the record. The testimony of these three witnesses is based on the position that the Respondent telephone companies can control the scope of the jurisdiction of the Federal Communications Commission by the manner in which they fix their charges.

"I think as Commissioner Hankin suggested the other day, it is rather novel doctrine that a regulated utility should be able to control the jurisdiction of the regulatory agency by what the utility contends that its charges cover.

* * * * * *

"Commissioner HANKIN. Well, we can agree with you that that is a reasonable interpretation, but is that the only interpretation, and if there is a possibility left for a different interpretation, isn't it competent for the

If there is among the Commissioners one who deems the information relevant, then such objections are overruled as a matter of course. Where the information is sought by one of the Commissioners, an objection to the question is *out of order*, for to sustain the objection would mean to interfere with the function of the Commissioner to weigh the facts in accordance with the theory of the case which he deems applicable. Referring again to the telephone case now pending before the Federal Communications Commission and this Commission, the respondents indirectly objected to a question asked by one of the Commissioners, and Commissioner Walker, who was the Chairman of this joint proceeding, said: "Well, you are in effect raising a query as to the right of a member of the Commission to ask questions." The objection was not even entertained.

This is the correct procedure in administrative proceedings in general. Under our statute, such procedure is imperative. Paragraph 97 (b)[13] provides that "any investigation, inquiry

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telephone company to introduce evidence based upon that interpretation of the statute?

"Mr. COHEN. Well, I think it isn't competent for the reason that, as I think I stated, it is predicated simply on the basis that the telephone companies are free to fix their charges on any basis they please and thereby control jurisdiction.

"Commissioner HANKIN. So long as they come within the terms of the statute?

"Mr. COHEN. Well, my position is that it is for the Commissions to make the determination as to whether the services they do cover come within the statute.

"Commissioner HANKIN. In other words, you come back to the first point that you would urge an interpretation of the statute which would preclude the telephone company from varying the scope of the Commissions' jurisdiction—that is true?

"Mr. COHEN. By simply saying what their charges cover.

"Commissioner HANKIN. Yes. Well, now, let us assume that we permit the telephone company to urge an interpretation of the statutes different from the one that you would like, don't you think that they should be permitted to introduce evidence which would bring out that interpretation?

"Mr. COHEN. If the Commissioner please, I think that is a decision for the Commissioners to make.

"Commissioner HANKIN. That goes to your motion as to the relevancy of that evidence, doesn't it?

"Mr. COHEN. I think that is correct, yes, sir" (Record, pp. 841–844).

[13] "PAR. 97. (b) A majority of the commissioners shall constitute a quorum to do business, and any vacancy shall not impair the right of the remaining

or hearing within the powers of the commission may be made or held by any commissioner." Under this provision, no question asked by a Commissioner can be ruled out as irrelevant, unless the question falls beyond the scope *of the powers* of the Commission itself. In this case, the Commission undertook to rule that certain questions fell beyond the "scope" of the proceeding. One of these questions related to the correctness of the base upon which the rates were to be computed. Surely it cannot be said that the correctness of the rate base in a rate-making proceeding falls beyond the powers of the Commission itself. And if it cannot be said that the inquiry falls beyond the powers of the Commission, the ruling constitutes a flagrant interference with the statutory powers and duties of the Commissioner who seeks to ascertain the correctness of the rate base.

In support of the Commission's rulings sustaining objections to questions asked by one of the Commissioners, the Company relied on the opinion of the Federal Power Commission in the matter of the *Hartford Electric Light Co.* (Opinion No. 58–A, decided October 21, 1941), in which that Commission had ruled that it was not necessary to make a finding based upon a theory of the case which the Commission had rejected. I am in thorough agreement with that ruling. The ruling of the Federal Power Commission in this regard, however, is a far cry from saying that the only evidence admissible is that which is necessary for the decision of the case upon the theory finally adopted. As a matter of fact, in the *Hartford case* itself some 1,100 pages of testimony was introduced by Counsel for the Hartford Electric Light Company, who is also the General Counsel of the Washington Gas Light Company, and the evidence was admitted on a theory which Counsel for both the Company and the Commission later realized was not necessary for the decision of the case.

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commissioners to exercise all the powers of the commission. Any investigation, inquiry, or hearing within the powers of the commission may be made or held by any commissioner, whose acts and orders, when approved by the commission, shall be deemed to be the order of the commission. The commission shall have power to adopt and publish rules and regulations for the administration of the provisions of this section, including the conduct of its investigations, inquiries, hearings, and other proceedings."

Proper administrative and judicial procedure, alike, require that a case should not be prejudged. If, upon any plausible theory, certain facts are relevant, they should be admitted, especially if one of the Commissioners deems that theory of the case applicable.

If, as it appears in this case, a Commission may rule out questions asked by a minority Commissioner, it follows that he may bring out only those facts which are acceptable to the majority, but no others; he may dissent on abstract questions of law, but not on matters of law which require a factual foundation. The Commission may as well tell him "to go home" and not participate in the hearing at all. In these circumstances it may fairly be said that if the information sought would be of benefit to the Company, the exclusion of the information deprives the Company of a full and fair hearing; if the information sought would be of benefit to the rate payers, then the exclusion of the information deprives the rate payers of a full and fair hearing.

As a matter of fact, as the proceeding has developed, neither the evidence nor the decision was limited to those questions which fell within the "scope" of the proceeding, as defined in the ruling of the Commission, when it excluded questions concerning the rate base.

The Commission excluded excess-profits taxes in the amount of $43,928.02, also $115,863.09 which are said to be abnormal income taxes due to the present war conditions. There is no provision in the sliding-scale arrangement for the elimination of any taxes [14] (a view apparently taken by the Commission in the course of the hearing), unless the words "reasonable accruals of taxes" are interpreted to mean that only such taxes may be deducted from gross revenue as are "reasonable" for

[14] The sliding-scale arrangement provides for the following method of computing the net amount available for return: "Having determined the Rate Base for a particular Adjustment Date, the Commission shall next determine the Net Amount Available for Return for the Test Year by deducting from the Gross Operating Revenue (Section 4) of the Companies the Adjusted Operating Expenses (Section 5) for the Test Year, the accruals for Retirement Reserve (Section 8), reasonable accruals for uncollectible bills, and reasonable accruals for taxes; * * *."

rate making purposes,[15] rather than taxes which may reasonably be expected to accrue.

In connection with the argument that it would be unfair to charge the consumers with the excess-profits taxes imposed on the Company, the present Chairman, himself, suggested a plan for consideration at the hearing, whereby the Company, upon receiving an increase in rates, would refund to its customers such part of the increase as might result in excess-profits taxes.[16] One will search in vain the sliding-scale plan for a proposition of this character.

The Administrator of the Office of Price Administration was permitted to intervene in this case. Among the evidence presented by the intervener were facts relating to the reasonableness of deductions for wartime taxes in computing the net operating income, and facts relating to the amount allowable for depreciation. That was objected to by Counsel for the Company on the ground that the evidence was beyond the "scope" of the proceeding, and the Commission sustained the objection. But when the Company, after reconsideration, withdrew its objection, the evidence was admitted.

It would thus appear that the rulings on admissibility of evidence were not based on any well defined concept of what constitutes the "scope" of the hearing, but depended largely on whether the majority of the Commission and the Company were willing to have the evidence admitted. The rulings made by the Commission, together with the circumstances attending the entire proceedings,[17] leave no doubt that the public had

[15] I think this is the only proper meaning of the phrase "reasonable accruals of taxes."

[16] More will be said about this plan later in this opinion.

[17] (a) In the course of the hearing, Counsel for the Company assumed to dominate the proceeding, even to the extent of attempting to annoy and order about Counsel for the intervener as to the manner in which he should conduct his case. No attempt was made by the present Chairman of the Commission to correct Counsel for the Company. Finally, I was compelled to inform Counsel that the Commission, and not the Company, was conducting the hearing.

(b) In the course of my cross-examination of the Company's witness concerning the plan suggested by the present Chairman, whereby the Company might return part of the increased rates in order to avoid payment of excess-profits taxes, some of the officers of the Company resorted to loud laughter,

not been given a full and fair hearing. It can, in no sense, be described as a judicial proceeding.

At the conclusion of the hearing, Counsel for the Office of Price Administration, as also other interveners (Washington League for Women Shoppers and the Fort Davis Citizens' Association) petitioned that the proceeding be reopened in order to permit a full hearing on all elements entering into the rate determination. The petition was denied. In view of the above, I think that the denial of the petition constituted reversible error.

The decision of the Commission was not based on deliberations by the Commission. I am not aware of a single meeting or conference held to discuss the many questions of fact and law involved in the case, except the applicability of the Act of October 2, 1942, "To amend the Emergency Price Control Act."

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and thus interfered with the cross-examination. Nothing was done by the Chairman of the Commission to correct such conduct on the part of participants in the proceeding.

(c) It was evident throughout the hearing that my questions were resented both by the Commission and the Company. Toward the end of his examination, the Company's principal witness made no attempt to hide his contumacious conduct. As was correctly reported by the Evening Star, September 12, 1942, "during the late afternoon, he (the Company's witness) displayed considerable annoyance over the continued Hankin attack, at times turning his back and shouting answers over his shoulder." Nothing was said or done by the present Chairman to correct such conduct on the part of the witness.

(d) At one time, after I directed some questions to the Commission's Chief Accountant, the following appears in the record (p. 623):

"Chairman FLANAGAN. Mr. McElfresh, did you make that calculation in furtherance of your investigation of these accounts and allocations as an accountant?

"Mr. MCELFRESH. No; I did not, sir.

"Commissioner HANKIN. In what capacity did you make that calculation?

"Mr. MCELFRESH. I made it at your request.

"Commissioner HANKIN. As Chief Accountant of the Public Utilities Commission, or someone I met on the street?

"Mr. MCELFRESH. As Chief Accountant of the Public Utilities Commission."

Thus the implication of the present Chairman's question seems to be that information furnished by the Chief Accountant to support the view of the majority is properly the information of an accountant. But when he furnishes information in opposition to that view, though requested by one of the Commissioners, he is not even acting in the capacity of an accountant.

According to the procedure adopted [18] by the Commission in cases where there is a division of opinion, the majority opinion and order must be submitted to the minority member; if he writes a dissenting opinion, it is submitted to the majority so that they might have an opportunity to amend the majority opinion; the minority member then has an opportunity to amend his opinion; then the majority and minority opinions, together with the order, may be issued. In this case, the majority opinion was submitted to the minority member on October 9th, in draft form. This was superseded by a draft dated October 12th, in which there were many material changes. The order was submitted for the first time, in final mimeographed form, on October 13th. On the same day, the Commission decided to issue the opinion and order without giving the minority Commissioner an opportunity to prepare his dissent. There was thus no opportunity for deliberation or discussion by the Commission prior to the decision of the case.

Operating Expenses

In the days when rate-making was full of speculation, due to the supposed constitutional necessity of arriving at the reproduction cost value of utility property, the regulatory agencies had a sufficiently difficult task when they concentrated their attention on the rate base. The utility commissions generally accepted the companies' figures relating to operating revenue, and very little was done by way of scrutinizing the operating expenses. Recently the Supreme Court held [19] that the Constitution does not bind rate-making bodies to the reproduction cost theory. No longer can regulatory agencies insist that they are compelled to compute rates upon an inflated rate base,

[18] "The following agreement was reached covering procedure in cases of disagreement between Commissioners prior to the issuance of orders or opinions: Draft of the majority opinion and order will be submitted to minority member and will not be issued until minority opinion draft has been served on majority members. Majority opinion and order may then be modified, and if the minority opinion is not modified, both will be issued simultaneously."
(Minutes of the Commission, March 3, 1942, p. 2161.)

[19] *Natural Gas Pipe Line Co.* vs. *Federal Power Commission*, 315 U. S. 62 S. Ct. 736.

and that they are required to do so by decisions of the Supreme Court.

There can also be no doubt that the proper basis for determining a reasonable return upon the property invested is the amount of the actual investment, which is the actual legitimate original cost of the property,[20] not the reproduction cost of something which probably is not reproducible. The determination of the actual cost of property is a task insignificant compared with that involved in determining value on a reproduction cost basis. With this major task in rate making reduced to mere auditing, it behooves regulatory commissions to turn their attention to the other significant elements of rate making, namely, the deductions from gross operating revenue and what constitutes a reasonable rate of return.

A public utility, which is entitled to a reasonable return, computed by *net* operating revenue, is under a constant duty to operate as economically as possible, and it is the corresponding duty of the regulatory agency to allow as deductions from gross operating revenue only such expenses and such other charges as are incurred for the benefit of the public, not for the benefit of anyone else. This rule is often stated in somewhat different language. It is said that a utility is entitled to a recoupment of all its operating expenses, provided they are reasonable. There is also a rule, however, that since the public utility is a private corporation, the regulatory agency should not interfere with the managerial functions of the directorate of the corporation. Adding these two propositions together, it has been argued that all expenses incurred must be allowed, unless it be shown that the directors have acted in disregard of their duties, for the reasonableness of the expenses depends largely upon the judgment of the directors, and to disallow expenses as being unreasonable would constitute an interference with the managerial functions.

The fallacy of the argument lies in adopting the psychological processes of the directors, that is, their *judgment*, as the test of reasonableness. What has been the practice of the

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[20] *In re Chicago District Electric Generating Corporation*, 39 P. U. R. (NS) 283; *Detroit* vs. *Pan-Handle Eastern Pipe Line Co.*, F. P. C. Docket No. 200, decided September 23, 1942.

directors heretofore, and what is the practice of directors of other utilities, are questions which hardly furnish a proper test of reasonableness. They are tests which, of necessity, impinge upon the managerial functions of the directors of the corporation.

In this case the Commission adopted a different and rather novel test of reasonableness, namely, the judgment of the Commission's witness. For example, with reference to an adjustment made by the Company in computing salaries and commissions chargeable to sales promotion expense; the Commission, after describing the method used by the Company, said, "and since this is the method used by the Commission's witness, we think the adjustment is proper".[21]

If the Commission is to avoid interference with managerial functions in this regard, it must apply tests of reasonableness which are objective and which are not a function of the judgment of the directors. In determining whether the amounts claimed as operating expenses are properly deductible from gross revenues, we must inquire: (1) Are any of the expenditures contrary to law or to the commission's rules and regulations; if they are, then they are unreasonable *per se*; and (2) If the expenses do not, on their face, contravene the commission's rules and regulations, they must, nevertheless, be scrutinized as to whether they are incurred for the benefit of the consumers, and if so, to what extent. Superimposed on these two tests is the proposition that the quantum of proof as to reasonableness is not the same as to all types of expenditures. For example, there is a difference between the proof necessary to establish reasonablenss of capital expenditures and that necessary to establish reasonableness of operating expenses. In the former case, the company spends its own money, and it may well be assumed that a utility will not incur unreasonable costs. Therefore, such expenditures need not be deemed unreasonable, unless they are excessive and perhaps raise a presumption of gross neglect, collusion or fraud.[22] In the case

[21] The Commission made no findings of fact which would lead to the conclusion that the expenses allowed are reasonable.

[22] *Re Pennsylvania Power and Light Co.* (F. P. C. Opinion No. 68), decided April 14, 1942.

of expenses incurred by the company as operating expenses, outlays which the company is entitled to recoup before the rate of return is computed, the situation is entirely different. Here the company is actually spending *other people's money*, and it is so easy to be liberal with expenditures when someone else has to foot the bill.

This is illustrated by the facts of this very case. In the 1941 proceeding, it appeared that the Company contributed about $1,200 to the Greater National Capital Committee, and claimed the amount as an "expense". The claim was disallowed. This year the contribution to the Committee was only $85. How easy it would have been for the Company to contribute $1,200 if the consumers of the District of Columbia were made to reimburse the Company! How quickly the directors of the Company decided that only about $100 would constitute a reasonable contribution, when they found that they had to dig into the Company's own coffers!

With these considerations in mind, let us look into the Company's operating expenses.

Expenses Contrary to the Commission's Rules and Regulations

Donations.—Under our Uniform System of Accounts, donations do not constitute operating expenses and must be charged to Account No. 538—Miscellaneous Income Deductions. Pursuant to this requirement, charitable contributions had been excluded from operating expense. Nevertheless, the Company included in its operating expense a number of donations, among them being a contribution of $1,250 to the United Service Organizations and $85 to the Greater National Capital Committee. These two items were disallowed by the Commission. I agree in the disallowance, but prefer to state my own reasons, because they are illustrative of the reasons for disallowance of additional amounts which the Commission has failed to disallow.

The Company argued that the contribution to the United Service Organizations should not be eliminated from operating expense, because this is not a charitable, but a military or a patriotic, contribution; that it is entirely a question of policy

whether the United Service Organizations should obtain small contributions from large numbers of persons or should look to large contributions from a few. In making this argument, the Company overlooks the essential principle behind the ruling that charitable contributions may not be charged to operating expense. They are not excluded from operating expense because they are charitable, but because they are contributions. No matter how laudable the purpose, a contribution or a donation is not an expense incurred for the benefit of the consumer in the service rendered by the Company.

In disallowing this item; we do not interfere with the judgment of the directors of the Company. On the contrary, we may applaud such contributions and encourage even greater contributions. But we have no right to permit the Company to be magnanimous at the expense of the public. We have no right or power to appoint the Company as an agency for the collection of charitable or patriotic donations, and we have no right to require the public to contribute for charitable or patriotic purposes, either directly or through the Washington Gas Light Company.

As to the contribution to the Greater National Capital Committee, the Company stoutly maintains that this is not a donation at all, but an "expense" incurred in order to promote the sale of gas, which is to the benefit of the consumer. The conclusion is rather far removed from the premise. The argument runs as follows: The Greater National Capital Committee sponsors conventions; conventions bring people to Washington; their activity in the District makes them hungry; when they get hungry, they eat in restaurants; the restaurants must cook food, and in doing so, must burn gas; the gas is supplied by the Company; the more gas sold, the less the cost to the consumer. *Ergo*, a contribution to the Greater National Capital Committee is an operating expense incurred for the benefit of the consumer. A better *Rube Goldberg cartoon* could not have been devised! By a parity of reasoning, any contribution for any purpose can be shown to inure to the benefit of the consumer. Such explanations of contributions as operating expenses do not constitute proof, but, on the contrary, cast

doubt on the validity of the Company's explanations for the treatment of other contributions as operating expenses.

In addition, the Company included the following items in operating expenses: Tickets to Police and Fire Outing—$10; tickets to Police and Fire Field Day—$30; tickets for representatives of the Company to a dinner to the retiring Superintendent of Police—$50; total—$90. The Company was quite ready to defend these as items of operating expense, but, upon the suggestion of the present Chairman, the Company conceded these items as being improper. Since the amount at issue is small, I should not have raised these questions, except for the fact, already mentioned, that none of the Commissioners had, prior to the hearing, any opportunity to go into the accounts, and the Commission's staff merely echoed the explanations given by the Company. The important thing about these three items is not the amount involved, but that there is no telling what might have been found in the accounts, had they been carefully analyzed.

The Company also contributed $1,668.30 to the Institute of Gas Technology in Chicago. It explained that this was an operating expense, because the Institute may train persons who may be helpful to the gas industry, that thereby this Company may be benefited, and consequently the consumers in the District of Columbia may be benefited. These problematical benefits for the consumer are much too far removed from actuality to treat the contribution as anything more than a donation to an educational institution.[23] Donations are no less gifts if the purpose is charitable, patriotic, educational or otherwise.

Services on Customers' Premises.—Included in operating expenses is the sum of $440,814.81, representing Services on Customers' Premises—Account No. 769. Of this amount, $389,098.33 has been allocated to services rendered in the District of Columbia. The items constituting this amount do not correspond to any items prescribed in Account No. 769, such as, improving character of service; inspecting, testing or adjusting customers' equipment; inspecting premises; investigating

[23] The Commission made no finding as to this contribution, but apparently allowed it as "reasonable."

and adjusting service complaints; or installing, removing and renewing gas lights. The items constituting this amount bear all the earmarks of merchandising and jobbing,[*] with nothing to show that the Company has given any heed to the instruction in Account No. 769 that expenses incurred in connection with merchandising, jobbing or contract work should not be included in this account.

In order to prove that the costs were not incurred in connection with the Company's appliance business, its witnesses testified that the expenses represented services rendered alike to all customers having these appliances, not merely those who purchased appliances from the Washington Gas Light Company. When asked for a breakdown of these services as between customers who purchased their appliances from the Company and other customers, the Company would not submit such breakdown, claiming that its service accounts are not so classified as to make such a segregation practicable. In the light of this fact, the entire sum of $389,098.33 should be disallowed, for want of proof that the items included constitute services other than those rendered in connection with merchandising and jobbing.

It is not necessary, however, to rest the disallowance on this ground alone. Section 8 of Order No. 2098, dated August 26, 1941, provided that "all piping, fixtures and appliances on the customer's side of the meter should be installed and maintained under the responsibility and at the expense of the customer or owner of the premises". Under this provision, it matters not whether the work was done for the customers who

[*] They are:

Refrigerators	$ 60,424.59
Househeating appliances	167,441.47
Househeating appliances—Utilization Dept	1,727.08
Commercial appliances	33,697.68
Commercial appliances—Utilization Dept	59.14
Commercial appliances—Government Sales Dept	442.92
Other appliances and miscellaneous (ranges and water heaters)	135,518.60
Other appliances and miscellaneous (ranges and water heaters)—Utilization Dept	25.38
Maintaining Installations	41,478.05
Distributed to Washington Gas Light Company of Montgomery County, Maryland	(51,716.48)
	389,098.33

had purchased their appliances from the Company or for other customers. None of the work on the appliances was chargeable to the rate payers, whether the work properly belonged to merchandising and jobbing, or otherwise.

The Company sought to distinguish between servicing and maintaining appliances. If you put an appliance in proper working condition, it is rendering service; if you have to use new parts, you maintain the appliances, the Company's witnesses said. It will be noted that one of the items is "Maintaining installations—$41,478.85". Even this, according to these witnesses, did not fall within the requirement that piping, fixtures and appliances shall be "installed and maintained * * * at the expense of the customer." In presenting these arguments by way of testimony, the Company is, in effect, asking us to distinguish between Tweedledum and Tweedledee. The words used in Section 8 are clear. To install means: "To set or fix in position for use or service: as, to install a heating or lighting system". To maintain means: "To hold or keep in any particular state or condition; esp. in a state of efficiency or validity".[28] In order to keep a refrigerator, a house heating appliance or a range in a state of efficiency, in other words, *in order to maintain it*, it may be necessary to adjust parts or make repairs with or without any parts. The distinctions sought to be established by the Company have no foundation, either in fact or in reason.

The Company further argued that to charge these services to individual customers might result in disaster. People would undertake to adjust their own appliances, and the results would be explosions, fire, conflagration, asphyxiation, etc. The argument is too ridiculous to be entertained. It may as well be argued that the Company should be called upon whenever it is necessary for a housewife to light the oven, for it may happen that she may turn on the gas, fill the room with it, and then strike a match, causing the entire room to explode. Undoubtedly, such accidents might have happened, but we live in an age when daily we use mechanisms which are by far more hazardous than a gas appliance. At any rate, the

[28] Webster's New International Dictionary.

argument has no validity as against the provision of Section 8 of Order No. 2098.

The same may also be said about the Company's argument that it is necessary or desirable to charge these services to the rate payers in general, as part of the Company's effort to promote the use of gas. This may be an argument for the elimination of Section 8, but by no means an argument for charging all the rate payers with what should have been charged to the particular customers. The Company is not at liberty to disregard the Commission's order merely because it thinks it can promote the sale of gas better by what has the appearance of "free service". There was a good reason for the inclusion of Section 8, and that is the requirement that the service rendered by the Company be as inexpensive as possible. If this service is not rendered "free", then there will not be as many calls upon the Company. The particular customer served may have to pay a small part of the $400,000, but the greatest part of this sum will not be reflected in the rates charged to all consumers. If the Company is anxious to promote the use of gas, it may consider doing so by lowering expenses, rather than by raising them.

Nothing was said by the Commission in support of its allowance of these $389,098.33.

Promotional Expenses.—Included in operating expenses are items totaling $243,420.50 [20] under the heading of "Sales Promotion Expense", of which $27,348.23 has been disallowed by the Commission. I think that the remainder, $216,072.27, should also be disallowed. Our Uniform System of Accounts permits promotional expenses, but there are two limitations, first, the promotional expenses must be incurred for obtaining *new* business, and second, the accounts relating to sales promotion expenses (Accounts Nos. 785 to 787) must not include

[20] The items are as follows:

Supervision	$83,577.50
Salaries and commissions	92,901.74
Demonstration	20,840.46
Advertising	49,794.81
Miscellaneous Sales Expense	27,636.37
Distributed to Washington Gas Light Company of Montgomery County, Maryland	(31,330.38)
	243,420.50

costs incurred in connection with merchandise or appliance sales.

The Company's witnesses admitted that in making these expenditures no distinction could be made between old and new business, and that all gas promotional expenses were incurred generally for the purpose of promoting the sale of gas. Yet, there is good reason for the distinction made in the Uniform System of Accounts between expenditures incurred in order to keep old customers and those made to get new customers. The former may not be included in operating expense, although the latter may. To charge to promotional expense the amounts spent for keeping old customers from going into the use of a competitive service, like that of the electric company, really means that the utilities get the consumers "coming and going". As the Illinois Commerce Commission said: [27]

> It is the opinion of this Commission that a house holder in Chicago should not be called on to pay in his rates for gas service the costs which the company may incur to hold his business, and also to pay in his rates for electric service the cost which the electric company may incur in an effort to take that business away from the gas company. The stockholders of the Company may permit the management to incur expenses to retain such business as it may see fit, but they cannot look to the rate payer to reimburse them for such expenses.

There is another reason why promotional expenses to keep old customers are not a proper charge against the consumer. Such promotional expenses are really expenses incurred to keep the customers' good will. If these expenditures are charged to the consumers, then it, in effect, means that the consumers are made to pay for their own good will. It has already been established that utilities are not entitled to increased rates based on the value of customers' good will included in the rate base. The inclusion of such promotional expenses in operating expense is another way of accomplishing the same forbidden result.

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[27] *In re: Peoples Gas Light and Coke Co.*, 19 P. U. R. (N. S.) 177, 265.

In view of the fact that the promotional expenses were incurred for the purpose of promoting the sale of gas generally, and not merely for the purpose of obtaining new business, this item should be disallowed for want of proof showing what part of the expense, if any, was incurred for the purpose of getting new business.

But there is still another reason why this item of sales promotion expense should be disallowed. This, like the one pertaining to service on customers' premises, does not conform to the instructions in the Uniform System of Accounts that expenses incurred in connection with merchandise or appliance sales should not be included. The Company did make a general allocation of some of the items, between merchandise and jobbing, on the one hand, and sales promotion expense on the other. The division was 20 per cent for the former, and 80 per cent for the latter. The Company made that division on the basis of their best considered judgment, but they could produce no facts upon which that judgment was based. In fact, the attitude of the Company is—this is our opinion, and that is all there is to it.

Under the Uniform System of Accounts, merchandising, jobbing and contract work must be included in Account No. 789 of the operating expense accounts, if the State's statutes or orders of the Commission having jurisdiction over the utility permit income to be reported as an operating expense item. Otherwise, such expenses must be reported in Account No. 520, as non-operating expenses. This matter had an interesting history in the regulation of the Gas Company by this Commission.

Prior to 1931, the Company, in accordance with the system of accounts then in effect, treated its appliance business as part of its utility business and charged both the income and expense to operating revenues and expenses. The appliance business was operated at a loss, and the loss was charged to the consumers, on the theory that these losses constituted legitimate promotional expenses. On March 12, 1931, the Commission issued Order No. 900, in which it held that the cost of handling, displaying and marketing appliances should not be borne by the consumers as a whole, nor taken into consideration in ar-

riving at any rate to be charged for gas service. After providing how the revenues shall be treated in the new account set up, and after directing that the cost should be charged to this account, the order specifically provided:

> This account shall also be charged, with the compensation of *all* employees engaged in the purchase, *sale*, delivery, installation, displaying, demonstrating and marketing of merchandise or of jobbing or contract work, *to the extent* that such employees are so engaged, together with *supervisory* expenses incident thereto, *all advertising* of such merchandise or work and expenses incident thereto, rental of display rooms, showrooms and warehouses, either in rented quarters or in property owned, to the extent that such quarters are used for the merchandise and jobbing departments, the cost of house services associated with the use of space for such purposes, the compensation of employees, engaged in billing, collecting and keeping the records associated with the merchandise and jobbing department, to the extent that they are so engaged, the costs of adjustments of merchandise incident to its installation and conditioning for use, the cost of making good any guaranty of merchandise or jobbing work, the cost of removing and reconditioning repossessed merchandise, and *all other expenses incident to or connected with the merchandise and jobbing department* not provided for in the foregoing. [Italics supplied.]

By Order No. 1846, dated January 11, 1940, adopting the Uniform System of Accounts prescribed by the Federal Power Commission, the Public Utilities Commission rescinded Order No. 900, and adopted the text of Income Account No. 520, and further provided that the list of items set out under Account 789 shall be applicable in governing the charges and credits to be made in Account No. 520. The items in Account No. 789 are substantially the same as those included in the above-quoted language of Order No. 900, and, in rescinding this order, there was no intention to vary the substance of what should be included as expenses in Account No. 520.

It will be noted that Order No. 900 provides that *all advertising* of merchandise shall be excluded from operating expense. Account No. 789 includes, as its first item, *advertising in connection* with the sale of merchandise. A mere glance at the book of advertising submitted by the Gas Company showed advertisements of merchandise, or in connection with the sale of merchandise, and the Company's witnesses testified that only a part of such advertising was allocated to merchandise and jobbing. It is evident that the Company followed neither Order No. 900 nor the Uniform System of Accounts in the treatment of advertising. The Company argues that the Uniform System of Accounts does not preclude allocations of expense as between various items of account. That undoubtedly is so. But while some items may be allocated, others may not. Assuming that all items are subject to allocation, there must, nevertheless, appear some basis for allocation rather than the mere opinion or judgment of the Company.

It is not necessary to burden this opinion with illustrations of the fact that the other items included in Sales Promotion Expense are subject to the same deficiencies. For example, there is nothing to show that the item of supervision—$83,577.50—actually related to the cost of supervising and directing the Sales Department and the solicitation of new business; there is nothing to show that the salaries and commissions ($92,901.74) were paid for canvassing and soliciting new business; there is nothing to show that demonstrations ($20,840.46) has nothing to do with the cost of employees engaged in selling merchandise and appliances; and there is nothing to show that the miscellaneous sales expense ($27,636.37) included only the cost of labor and materials used and expenses incurred in soliciting new business. There is nothing to show that any of these items excluded the 17 items set forth in Account 789.

The Commission made no findings in respect of all these questions. It did recognize that the Company had not made a sufficient showing. With reference to the items for advertizing it said: "The fact that the Company segregates appliance advertising from its other or institutional advertising might

of itself be sufficient grounds for saying that all of such advertising relates entirely to the Merchandising Activities of the Company". Why did not the Commission so hold? What are the counterbalancing reasons? One finds only this: "However, in view of the practice of participating in advertising campaigns of other dealers we will go no further than the adjustment made by the Commission's witness". And now one may continue to wonder what connection there is between the Company's practice and the requirements of our system of accounts, and whether the Commission has surrendered its function of judicial determination to its witness.

In view of the above, I think that the entire amount of sales promotion expense should be disallowed.

Expenses Not for the Benefit of Consumers

The above items claimed as operating expense should be disallowed because they do not comply with the Commission's accounting orders, rules or regulations. The reverse does not follow. The mere fact that items of expense do fall within the operating expense classification of the System of Accounts does not mean that they should be allowed. The question still remains whether the claimed items of expense are incurred in the service of the public, and to what extent. To hold otherwise would mean to reduce the rate making function to mere bookkeeping and to surrender this judicial function to the accountants.[28] No system of accounts has been devised, nor will a system of accounts probably ever be devised, which will distinguish between expenditures incurred for the benefit of the consumers and those incurred for the benefit of the corporation's stockholders. For this reason, we must weigh the items of expense to the end that the consumers should not be required to pay for something which does not represent a service to them, but a service to others.

[28] This is a complete answer to the reasoning of the majority that all the operating expenses, except those disallowed have been recorded in accordance with the Uniform System of Accounts and that they are "fair and reasonable and properly considered in the determination of rates under the sliding-scale arrangement".

Association Dues.—This is illustrated by the inclusion of association dues in Account No. 801—Miscellaneous General Expenses. Does the inclusion of association dues mean that the rate payers may be charged whatever dues the Company chooses to pay, whether that constitutes a service to them or otherwise? I think not. For example, it would be unthinkable to allow as operating expense dues or other contributions made to political organizations. It follows that only such association dues may be charged to the consumers as are of benefit to them in the service rendered by the Company.

The Company is a member of the American Gas Association and pays annual dues of about $6,000. It may be assumed, for the purposes of this proceeding, that this is a proper item in operating expense. But the Company has also charged to operating expense dues to the American Management Association ($100), dues to the United States Chamber of Commerce ($150), dues to the Merchants and Manufacturers Association ($150), and dues to the Better Business Bureau ($225). How do these payments result in improved gas service to the public? The record does not show to what extent this Company is actually benefiting from membership in these organizations. This, however, is a minor phase of the problem. The more immediate and important question is: To what extent is the *rate payer* benefiting from the fact that the Washington Gas Light Company is contributing to the support of these organizations? When such expenditures are incurred, and they are brought into issue, the burden is on the Company to show the extent, if any, the rate payer is benefiting from these expenses. The record has not developed these elements of fact. No showing was made by the Company, apart from its general claim that the Company gets "industrial information" from these organizations. If this is the entire justification for the treatment of dues as expenses, it is my opinion that they should be disallowed.

It is not for us to bear the burden of proof and to seek out information why dues or other contributions to various organizations should be disallowed from operating expense. However, in the brief time at my disposal, I did have occasion to look into two items of dues paid out by this Company—dues

to the National Association of Manufacturers ($100) and a contribution to the National Industrial Information Committee ($250). Here also, the Company's evidence in support of these expenses consisted merely of a statement that "they disseminate information of value to the industry generally". This is hardly a reason for making a contribution and charging it to the rate payer, even if the organizations did actually furnish *information*. However, the National Association of Manufacturers and its Committee on Industrial Information had figured very prominently in the investigation made by the Senate Committee on Education and Labor, pursuant to S. R. 266 of the 74th Congress, concerning violations of the right of free speech and assembly and interference with the right of labor to organize and bargain collectively. In his report concerning the National Association of Manufacturers (Report No. 6, Part 6, 76th Congress, 1st Session), Senator LaFollette said (page 154):

> The National Association of Manufacturers had opposed the principal legislative measures sponsored by the national administration during the Congressional session of 1935. It had opposed the National Labor Relations Act, the Social Security Act, the Banking Act, the Utility Holding Company Act, and the President's tax program. In spite of the Association's opposition, all these measures became law. This was a great blow to the Association; but its officers remained undaunted and they redoubled their propaganda efforts. The program of 'education' that was initiated in 1933 and 1934 now became its principal weapon of defense for the status quo and it was carried forward with mounting intensity * * *.

In Chapter 5 of Part 6 of his Report, Senator LaFollette analyzes the nature and techniques of the Association's propaganda material. There is no doubt in my mind that the Association was not one engaged in disseminating industrial *information* for the purpose of improving the gas service to the public, but was and is a *propaganda organization* for the purpose of disseminating a point of view on industrial relations.

There should be no objection on the part of this Commission to contributions by the Company, even for such purposes. In other words, we need not interfere with their managerial judgment. But the Company should not be made a vehicle whereby the rate payer would be compelled to pay for the upkeep of such propaganda.

In view of the above, the dues and contributions to various organizations should be disallowed in the sum of $975.00.[29]

Salaries.—One must not forget that a public utility is engaged in a service to the public. While it has often been said that the persons engaged in such public calling cannot serve two masters at the same time, the fact remains that the officers and executives of the corporation do serve both the public and their stockholders, and very often the interests they serve are in conflict. When the executives and other officers find themselves in this dual service, it is reasonable that, insofar as the service is rendered to the public, the rate payers should pay for it; insofar as it is rendered to the stockholders, the latter should pay for it. Of course, it is not possible to apportion with any degree of accuracy how much should be paid by the rate payers and how much by the stockholders. Nevertheless, there are bases of comparison which give a proximate idea of the amount which the public usually pays for services requiring similar amounts of ability and effort.

The testimony introduced by the Company was limited to the fact that the salary of the President during the year was $31,666.50;[30] the salary of the Vice President and General Manager was $18,000; that of the Vice President and Treasurer $15,000; that of the Assistant Vice President $8,800, and that of the General Counsel $18,000; and that these salaries were set by the Board of Directors. The contention is that the Commission may not disallow any part of these expenses, unless the Board of Directors had acted in an arbitrary or unreasonable manner; otherwise, we should be interfering with the managerial functions of the corporation.

[29] The Commission made no findings as to these disputed items, but allowed them as "reasonable".

[30] On the basis of $32,500 per year.

As has been stated, it is not necessary to interfere with the managerial functions of the corporation in order to ascertain the reasonable amounts which the public should pay for the services of the officers and executives of the corporation. It may be assumed that the directors acted in full compliance with their duties as directors in voting such salaries to these officers. It may even be assumed that the value of their services is many times what is actually paid to them. The pertinent questions are: Whom are these men serving? To what extent should the consumers of gas be required to pay for such services? Assuming that these officers and executives devote full time in behalf of the consumers, what are the comparable salaries which the public pays for similar services? Is it conceivable that the services rendered by the President of the Company are worth to the public more than one and one-half times as much as those of a Justice of the Supreme Court of the United States; or more than twice that of a Cabinet Officer; or more than three times that of a Member of Congress; or more than three and one-half times that of a Commissioner of the District of Columbia? Is there any comparison in the amount of knowledge, ability, work and effort required, between the position of the President of the Washington Gas Light Company, and these other positions of public service? Why should the public be required to pay $32,500 for the services of the President of the Company merely because the payment is made through a public utility corporation rather than through a governmental agency?

These questions have never been answered in the record. I think that the answer lies in the proposition that, when the public pays for a public service, it should not be required to pay more than for comparable public services. If the directors of the corporation, within their judgment and discretion, think that they should pay much higher salaries, they may do so in the interest of the stockholders, but we should not permit such salaries to be charged to the public.

What are the comparable public services in this jurisdiction? The position of public service in the District of Columbia most comparable to that of the President of the Washington Gas Light Company is that of the head of the Water Department

of the District of Columbia. He receives a salary of $5,600 per year. True, his work is generally supervised by the Engineer Commissioner of the District of Columbia, but the latter receives a salary of only $9,000 per year. If we allow, as the public's part of the salary of the President of the Washington Gas Light Company, as much as $10,000 per year, no injustice can possibly result. Similarly, the public's share of the salary of the Vice Presidents might be put at $8,000 per year, and that of the Assistant Vice President at $6,000 per year. The work of the General Counsel of the Company may be compared to that of the Corporation Counsel of the District of Columbia, except that it is very much more limited in scope. True, the General Counsel of the Washington Gas Light Company must pay his own overheads, but it is also true that the Washington Gas Light Company is only one of his clients. If we were to allow $9,000 as the public's share of his annual salary, that would be more than sufficient.

None of the above questions were even considered by the majority. I think that the salaries of general officers and executives for rate making purposes should be reduced by $50,966.50.

TAXES

The sliding-scale arrangement provides that in computing the net amount available for return, allowance should be made for "reasonable accruals for taxes". The word reasonable, as has already been indicated, refers to the taxes to be allowed for rate making purposes. Any taxes which do not contribute to the service rendered to the public are not in any sense reasonable allowances for rate-making purposes.

Capital Stock Taxes.—So far as the public is concerned, it is interested in receiving gas service. It is not concerned with the question whether that service is rendered by an individual, a partnership or a corporation. Utilities are not ordinarily operated by individuals, because the amount of investment is generally too large to be borne by a single person. Where a group of persons undertake to do such business, there are various forms of business enterprise available to them, and the form usually adopted is the corporate form. There are dis-

tinct advantages which attend the doing of business in corporate form, and, if persons engaged in a utility enterprise desire to profit by these advantages, they, not the rate payers, should pay those expenses which are incident to the conduct of business in corporate form.

The stockholders should bear the burden of capital stock taxes (totaling $48,155.11), because these are taxes imposed on the privilege of doing business in corporate form. They are unlike other excise taxes or property taxes which are incident to the business of the utility. Such taxes are allowable as deductions from operating revenue, because they are paid in order to preserve the business of the utility. Capital stock taxes, however, being imposed on the doing of business in corporate form inure to the benefit of the stockholders, not the consumers, and the stockholders should therefore bear the cost of such taxes.[31] Since the capital stock taxes are a charge on the privilege of doing business in corporate form, they cannot be said to be "reasonable accruals of taxes" chargeable to the rate payers.

Income Taxes.—This brings us to the main question presented by the interveners, namely, the amount which should be allowed as a deduction from gross revenue for income taxes. It is my view that income taxes should not be allowed at all as deductions from gross revenue. These are direct taxes imposed on the corporation's net income, after deduction of all expenses. They are not taxes imposed in connection with the gas service, but after the service is rendered and the charges are paid. The entire theory of the income tax is that it must operate as a direct tax on the income and should not be passed on to others. To allow such taxes as a deduction from gross revenue actually means that the regulatory commission exempts the utility corporation from the payment of an income tax and shifts the burden of that tax to the consumers. In the absence of a statutory provision to that effect, which would virtually exempt utility corporations from the payment of income taxes, I do not think that the Commission has the power or authority to grant such an exemption.

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[31] *In re Long Island Light Company* (N. Y. P. S. C.), 18 P. U. R. (N. S.) 65, 207.

I realize that this is a minority view, and that the Supreme Court itself has held that income taxes are properly deductible from gross revenue. I therefore do not urge at this time that all of the Company's income taxes should be disallowed as a deduction from operating revenue. I think, however, that this question should be brought to the Supreme Court for early reconsideration.

The allowance of income taxes as a deduction from gross revenue does not mean that all income taxes must be allowed. Among the items of income taxes paid by the Washington Gas Light Company during the past test year, is an excess profits tax of $63,663.79. The Commission's staff suspended this amount, but credited the income taxes with 31% thereof, because, had the excess profits tax not been paid, the normal tax and surtax would have been increased by $19,735.77. The Commission has sustained this suspension, and rightly so, because, as a public utility, the Washington Gas Light Company is not entitled to any excess profits. To make the consumers pay a rate which would permit excessive profits, and then to require them to pay the excess profits tax, would be heaping injury upon an injury.

Assuming that income taxes, other than excess profits taxes, may properly be deducted from gross revenue, the question still remains whether it would be reasonable to allow a deduction for the entire amount of income taxes paid during the test year. We are passing through a state of emergency in which our Nation, together with the other United Nations, is fighting for the existence of our civilization, not merely for the existence of our own institutions. We are engaged in a war which, more than any other war in the past, involves not only the military forces, but also all of our economic forces, and even relationships which are neither military nor economic. It has become established that not only our military machine, but also our entire economic life, must be geared to the exigencies of this war.

First in preparing for this gigantic struggle and then in the prosecution of the war itself, Congress imposed heavier taxes than were ordinarily necessary to keep the wheels of Government going. Various types of taxes were imposed; among

them, significantly, increased income taxes, on the theory that each and every person must shoulder the burden and responsibility of the war.

For the years 1936 through 1939, the income taxes paid by the Company amounted to 19% of its net income. In the next year the tax burden rose to 31%, and in 1942 to 40%. Should these added taxes be passed on to the consumers? Should the consumers, who bear their own tax burden, also bear the burden imposed by Congress on the Company to aid in the prosecution of the war? I think these additional taxes should under no circumstances be passed on to the consumers. We should not create a class of corporations exempt from the duty of contributing to the Nation's fight for its existence.

Recently, the Federal Power Commission arrived at the same conclusion.[32] Commissioner Scott, speaking for the Commission, said:

> We take judicial notice of the fact that our country is waging a war for survival. It is common knowledge that there will be increased tax burdens resulting from the requirements inherent in a global conflict. Business as usual is out—in fact, a great many so-called "small enterprises" have ceased to exist. Normal business during this period of grave emergency is at an end. Obviously, no one can expect to maintain a status or condition of business unaffected by the holocaust now sweeping the world. Increased tax burdens must be borne by the utility which enjoys a monopolistic position in the economic field, as well as by others who have no such advantage.
>
> * * * * *
>
> So that there may be no confusion concerning the tax situation in connection with the companies subject to our jurisdiction, where necessary to stabilize utility rates at reasonable levels during the war emergency period, we propose to allow as proper operating expenses only such taxes as may be termed ordinary or normal

[32] *City of Detroit et al. vs. Panhandle Eastern Pipe Line Company et al.*, Opinion No. 80, decided September 23, 1942.

> For the purpose of distinguishing between ordinary or normal and war emergency or abnormal taxes, we conclude that the basis prescribed in the 1940 Revenue Act establishes the highest possible level of Federal taxes which may be allowed as an element of operating expense for such purpose. The 1941 Revenue Act and the pending 1942 proposal certainly reflect abnormal tax requirements for war purposes.

The Commission disallowed only $115,863.09 of the war taxes, on the theory that 31% is "reasonable". This the Commission did, as it stated, "after weighing all factors to the best of our ability". What factors did the Commission weigh? Upon what facts? Upon what findings? Surely there was no call for such exertion on the Commission's part when the evidence in the record clearly showed that for the years 1936 through 1939, years of normal taxes, the rate was 19% and that the taxes for the test year ended June 30, 1942, were over $300,000 in excess of what might be termed ordinary or normal taxes. I think that, in addition to the amount disallowed in the form of excess profits taxes ($43,928.02), and the amount of income taxes disallowed by the Commission, income taxes should be disallowed in the sum of $143,706.30. To this should be added the sum of $439.05 paid by the Company to Stone and Webster for expenses in connection with work on excess profits taxes.

There is an additional and transcending reason for the disallowance of the extraordinary and abnormal war taxes. They result in an increase in rates which contributes to the inflationary tendencies in our present economy and thwarts our war effort. Both Congress and the President embarked upon a policy to curb inflationary tendencies. On July 30, 1941, the President addressed a message to Congress requesting the enactment of legislation for the control of prices. Therein he stated:

> Inflationary price rises and increases in the cost of living are today threatening to undermine our defense effort.

Congress responded by enacting the Price Control Act, in which it gave wide powers to the Office of Price Administration. True, Congress specifically omitted jurisdiction over public utilities, but only because it was felt that the regulatory agencies having jurisdiction over the utilities would redouble their efforts to control prices charged by them and would accomplish the same result of curbing inflation.

On August 27, 1942, the President laid before Congress a seven-point national economic policy designed to stabilize the domestic economy of the United States for the duration of the war. The objective was to prevent any further rise in the cost of living. In his famous Labor Day Message to Congress, the President reiterated his stand that inflationary tendencies must be curbed as a war measure. He said:

> War calls for sacrifice. War makes sacrifice a privilege. That sacrifice will have to be expressed in terms of a lack of many of the things to which we all have become accustomed. Workers, farmers, white collar people, and businessmen must expect that. No one can expect that, during the war, he will always be able to buy what he can buy today.

With reference to the function of taxation in economic stabilization, the President further said:

> One of the most powerful weapons in our fight to stabilize living costs is taxation. It is a powerful weapon because it reduces the competition for consumer's goods—especially scarce foods.
>
> The cooperation and self-restraint of the whole Nation will be required to stabilize the cost of living. The stabilization of the cost of living cannot be maintained without heavy taxes on everyone except persons with very low incomes. With such increases in the tax load, unfair tax distribution becomes less and less tolerable. We can rightfully expect the fullest cooperation and self-restraint only if the tax burden is being fairly levied in accordance with ability to pay.

> This means that we must eliminate the tax exemption on interest on State and local securities, and other special privileges or loopholes in our tax law.
>
> It means that in the higher income brackets, the tax rate should be such as to give the practical equivalent of a top limit on an individual's net income after taxes, approximating $25,000. It means that we must recapture through taxation all wartime profits that are not necessary to maintain efficient all-out war production. Such provisions will give assurance that the sacrifices required by war are being equitably shared.

Here the Commission, by exempting the Company from a a part of the war taxes grants an increase in rates, not because there is any showing that the existing rates are unreasonably low or confiscatory, but because apparently a formula adopted in 1935 is deemed more important than our national policy. The granting of the present increase flies in the face of the policy established by Congress and the President. It is a challenge to the Congress and the President, and, within the shadow of the Capitol and the White House, sets an example for other commissions to follow.

The Commission did include a provision in its order whereby any portion of the amount derived from the increased rates, which, if retained by the Company, would be subject to excess profits tax shall be refunded to the customers. This arrangement is said to be designed to guard against the possibility that the increase might result in inflation.[33] If the arrangement has any meaning, it is hardly a plan which is apt to have the effect of preventing inflation. I am rather inclined to the view that the plan adopted will tend in the opposite direction. The plan simply means that the Company will charge increased rates and that, if the Company has to pay excess-profits taxes,

[33] The opinion states that the Commission requested the Company to propose such a protective arrangement. The record shows that the arrangement was not proposed by the Company but by the present Chairman of the Commission. In fact, on cross-examination, the Company's witness testified that he was not prepared to explain the consequences of this arrangement, because, though introduced by the Company, it was an arrangement suggested by the Chairman himself.

then rather than pay such taxes the Company will refund the amounts to the consumers. Yet, if the inflationary effect of increased prices is diminished through taxation, as was stated by the President in his message to Congress, then it may fairly be said that the plan or arrangement will have the effect of furthering inflation rather than preventing it.

The majority opinion seeks to minimize the inflationary effect of the increase allowed. The opinion makes an advertising appeal. The domestic customer will have to pay only 3¢ per month additional, the space-heating customer only 57¢ per month additional; the average increase will be only 46¢ per month additional. How often have we read in the advertising columns: "Buy this set of books for only $100; it costs you only 1¢ per day"! The fact of the matter is that these few cents per month mean over $200,000 taken from consumers, and given to the Company. Tall oaks from acorns grow. These tiny increases are the ones which cumulate into a destructive force.

Depreciation

I have thus grouped the items which should be disallowed as deductions from gross revenue within the terms of the sliding-scale arrangement itself. Unlike these, but like the question I raised as to the rate base, the deduction for depreciation or retirement expense should be adjusted in the light of actual facts and in the light of the recent decision of the Supreme Court in *Natural Pipe Line Co.* vs. *Federal Power Commission*, 315 U. S. —. The provisions in the sliding-scale arrangement as to retirement expense are rather complicated. Reduced to the simplest terms, it means that the retirement reserve shall consist of 1¾% of the initial rate base plus 1¾% of any additions to the rate base from year to year, and that 4% of the cumulated retirement reserve shall be deducted as retirement expense.

There are two errors in this method of arriving at the retirement expense. First, it is computed on the basis of both depreciable and non-depreciable property. Whatever may be the proper rate of depreciation, it cannot be computed on that

part of the rate base which does not depreciate. Therefore, in computing depreciation reserve, the percentage provided must be applied to the rate base diminished by the amount of non-depreciable property. The second error lies in the fact that, while the Company is permitted a rate of return of 6½% on its undepreciated rate base, the amount deducted as depreciation expense is only 4% of the depreciation reserve. This actually means that, in addition to the Company being allowed a return of 6½% on the depreciated rate base, it is allowed an additional 2½% on property which is no longer in existence.

Such computations of retirement expense or depreciation had been pursued in the past on the theory that that also was required by the decisions of the Supreme Court. In the case of *Natural Pipe Line Co.* vs. *Federal Power Commission*, supra, the Supreme Court expressly held that in the computation of a fair return on property used and useful in the service, there is no room for the argument that the Company must be allowed a premium on the depreciation reserve in addition to a fair return on the investment.

Applying the percentage of retirement to the depreciable property only, and applying the same percentage to the cumulated depreciation reserve as is applied to the rate of return, the amount of retirement expense, the record shows, is $120,732. In other words, the deductions from gross revenue should be further reduced by $227,338.01.

Conclusion [34]

In view of the foregoing, the Company, during the past test year, earned at least $874,372.78 in excess of 6½%, and *under the sliding scale arrangement, $617,874.36* should be applied to rate reductions. This computation, limited to the sliding scale arrangement, imputes no recognition on my part that the Company is entitled to retain any amount over and above 6%. In other words, with the record in its present state,

[34] The computations of the figures in this conclusion were furnished by the Chief Accountant of the Commission, in accordance with this opinion.

no injustice would be done, if the rates were reduced by $1,009,207.04.

GREGORY HANKIN.

Draft opinion filed October 13, 1942.
Revised opinion filed October 14, 1942.

Public Utilities Commission of the District of Columbia

Formal Case No. 316

In the Matter of RATES, TOLLS, CHARGES, TARIFFS, RULES, REGULATIONS, AND CONDITIONS OF SERVICE OF THE WASHINGTON GAS LIGHT COMPANY

Commissioner HANKIN, dissenting:[35]

I cannot agree with Order No. 2404, purporting to grant the petition filed by the Price Administrator in behalf of the Director of Economic Stabilization, because the order does not constitute sufficient compliance with the petition, nor with the Act of October 2, 1942, "To amend the Emergency Price Control Act". I believe (1) that Order No. 2401, authorizing an increase in rates, should be vacated, and (2) that the case should be reopened for the purpose of arriving at a correct rate structure without limiting the Director of Economic Stabilization to the development of evidence relating solely to the inflationary effect of the ordered increase.

1. The Price Administrator, in behalf of the Director of Economic Stabilization, petitioned that Order No. 2401, issued on October 13, 1942, be vacated. In his petition, the Price Administrator stated that the issuance of this order, without

[35] This is a belated dissent to Order No. 2404, issued on October 23, 1942. As I pointed out in my previous dissent in this case, the rule adopted by the Commission requires that the draft of the majority opinion and order be submitted to the minority member, affording him an opportunity to write his dissent; then the minority opinion draft must be served on the majority that they might have an opportunity to modify their opinion or order; then if the minority opinion is not modified, both opinions and the order are issued simultaneously. In this case, the majority opinion and order were not shown to me until about ten minutes before they were issued. There was, therefore, no opportunity to write a timely dissent to be issued together with the majority opinion, and the majority of the Commission had no opportunity to consider the views expressed herein. This may be unbelievable, but it is true.

notice to the Director of Economic Stabilization and without giving him an opportunity to intervene in this proceeding, was invalid and constituted a denial to the Director of his right to appear in this proceeding.

In a letter accompanying this petition, the Price Administrator stated: "It is my judgment that the action of the Commission in issuing an order without prior notice by the Company to the Director of Economic Stabilization * * * is violative both of the letter and the spirit of the Act of October 2". He concluded with the request that the Commission "re-open the proceedings and rescind the order in this case". The Director of Economic Stabilization joined in this request. For the reasons stated in my dissent from Order No. 2401, I think that the order was invalid, and should therefore be vacated.

In its present opinion (accompanying Order No. 2404), the Commission recites that Counsel who filed the present petition is the same Counsel for the Office of Price Administration who had participated in the hearings which culminated in the Order No. 2401, implying that there was anticipatory compliance with the statute. This implication is entirely erroneous. Counsel appeared then for the Office of Price Administration whose intervention was a privilege granted by the Commission. Now he and the Price Administrator are appearing in an entirely different capacity, namely for the Director of Economic Stabilization under an Act of Congress. Even if the President, by Executive Order No. 7250 issued October 3, 1942, had designated the Price Administrator and his counsel as the agency to receive notice as provided in the Act of October 2nd, there would not have been sufficient compliance with the statute.

The Commission also recites the fact that the record was closed prior to the approval of the Act of October 2nd. This did not justify a decision contrary to the law. Even if the case had been decided prior to the passage of the Act, it would have been the duty of the Commission to vacate its order and comply with the requirements of the new law. When a case has gone through the administrative proceedings and through

the courts, including the Supreme Court of the United States, and, within the same term of Court, a statute is enacted which renders the decision of the Supreme Court inconsistent with the statute, the proper procedure is to vacate the order, and to decide the case in accordance with the new legislative mandate. Orders looking *in future*, whether rendered by administrative agencies or courts, must be consistent with the law as of the time when the orders are in operation. Therefore, the conclusion reached by the majority, that it had followed in substance the provisions of the Act of October 2nd, because the record was closed prior to the approval of the Act, is entirely erroneous. On the contrary, in view of the facts attending this legislation, the record should not have been closed; and if it was closed, it should have been immediately reopened when Congress passed the Act. The law does not contemplate that the validity of rates depend on whether the Commission or Congress acts with greater haste.

But let us assume that I am wrong in all I have written in my dissent from Order No. 2401 and in all I am saying here. Let us suppose that the Director of Economic Stabilization and the Price Administrator are wrong in maintaining that the order is invalid. Nevertheless, the respect and courtesy due to these high officers of the Federal Government should have impelled some recognition to their petition that the order be vacated. The Commission might have, at least, set this question for argument. Instead, this request was neither granted nor denied, but *ignored*, as if unworthy of consideration.

2. The majority opinion enumerates a list of detailed steps in the intervention of Counsel for the Office of Price Administration, giving the impression that he had full opportunity to be heard. The record, however, is replete with evidence that the treatment accorded to him in effect nullified his intervention. In my dissenting opinion I reviewed the entire administrative procedure followed in this case and demonstrated that the public had been denied a full hearing.

The majority, in reopening the case for the purpose of receiving "additional evidence relating to the inflationary effect, if any, of the increase in rates" is now attempting to treat the Director of Economic Stabilization in the same manner

as it treated Counsel for the Price Administrator. The Director may intervene, he may introduce evidence, but only to show that an inflationary effect is attributable to the particular $200,000 granted as an increase in rates; to the 3 cents per month which, the majority said, constituted the increase to the average domestic consumer; to the 1/37 of 1 per cent increase in the cost of living index; as to all of which the majority has already concluded: "We cannot conceive that such an increase would have material inflationary tendencies". Yet, if one is to balance economic factors in order to determine inflationary effects, is it not pertinent to consider whether the rates are not already inflated? If a rate is unreasonably low, an increase may be justified. It may not be inflationary, because it would merely bring this cost into proper balance with other costs. But if a rate is unreasonably high, it already contributes to the inflationary effect, which should be removed. Does it not, therefore, become the function of the Director to see whether the rates should be lowered, rather than raised? Under the Act of October 2nd, the Director of Economic Stabilization is given a right to intervene, a right without limitation. For the Commission to say to him that he may intervene, but may not go into all elements of fact and law which he may deem necessary for the determination of the reasonableness of the rate, is to deny him his statutory right as effectively as if the petition were denied outright.

This is disputed by the majority. They say in effect that the Act of October 2nd directs the *public utilities* to give notice to and to consent to intervention by the Director of Economic Stabilization; the Act contains no directives addressed to the regulatory agency themselves; therefore, there is no violation of the Act if the Commission grants an increase, or denies the Director's petition to intervene; and if it may deny him the right to intervene, it may certainly limit the scope of his intervention.

The fact that the statute does not direct the Commission to do or to refrain from doing anything, does not mean that the Commission may so act as to nullify the legislative objectives. The Internal Revenue laws direct the utilities to pay income taxes; these laws do not direct the Commission to do anything.

Yet, is it conceivable that the Commission may require the utilities not to pay the taxes? Wherein would such an order be different from Order No. 2401, in which the Commission *required* the Company to charge higher rates, after Congress directed the Company not to increase its rates unless it first gave notice and consented to intervention as prescribed by the statute? I can see no difference. Could the Commission then say: Let the Company give notice, let it consent to intervention by the Director of Economic Stabilization, we shall render the Act impotent by denying any petition to intervene or by so limiting the intervention as to render it useless? To ask the question is to answer it.

Emergency legislation cannot be drafted with the niceties required of criminal statutes. The mere fact that this statute contains no directives addressed to the Commission, in no way absolves it from its duty to follow the law, especially since our own organic act provides that it shall be the duty of this Commission to enforce not only the provisions of our Public Utility Law, but also "all other laws relating to public utilities".

The majority arrived at the conclusion that the Company was entitled to a rate increase in the sum of $200,000. I arrived at the conclusion that, upon the record made, the Company's rates should be decreased by $617,000. Most of my disallowances were based on the fact that the Company had failed to sustain its burden of proof. It may well be that if the Company were given an opportunity to prove by competent evidence that some or all of those items should be allowed, it would do so. In these circumstances, there is but one way, it seems to me, in which the Director of Economic Stabilization can effectively carry out the intent of Congress and the President, and that is by full participation in the development in the record of all elements of fact which enter into the determination of just and reasonable rates chargeable by the Washington Gas Light Company; by insisting on strict proof relating to the proper rate base, proper allowances for operating expenses, reasonable allowances for taxes and reasonable deductions for depreciation; by insisting that the Commission make specific findings of fact, rather than mere conclusions or inferences

of fact;[*] and by insisting on the strict application of the fundamental rule of administrative decision, that the order be supported by the findings and that the findings be supported by the evidence.

GREGORY HANKIN, *Commissioner.*

OCTOBER 24, 1942.

Public Utilities Commission of the District of Columbia

Formal Case No. 316

In the Matter of INVESTIGATION OF RATES, TOLLS, CHARGES, TARIFFS, RULES, REGULATIONS, AND CONDITIONS OF SERVICE OF THE WASHINGTON GAS LIGHT COMPANY.

Commissioner HANKIN, dissenting:

On October 13, 1942, this Commission issued Order No. 2401 in which it ordered the Washington Gas Light Company to increase its rates, despite the provision in the Act of October 2, 1942, which prescribed that no public utility may make any general increase in its rates which were in effect on September 15, 1942, unless it first gave thirty days' notice to the President, or his agent, and consented to his timely intervention before the regulatory agency having jurisdiction to consider such increase.

The Price Administrator, acting in behalf of the Director of Economic Stabilization (the agency designated by the President to receive such notice) filed a petition with this Commission in which he prayed that the order of October 13, 1942, be vacated, and that he be permitted to intervene in this proceeding. On October 23, 1942, the Commission issued Order No. 2404, in which the record of the proceeding was reopened for the purpose of receiving from the Office of Price Administration, on behalf of the Director of Economic Stabilization, "additional evidence relating to the inflationary effect, if any, of the increase in rates authorized by Order No. 2401"; the request that the order be vacated was ignored, and the case was set for a formal public hearing on November 2, 1942.

On October 31, 1942, the Price Administrator, acting in behalf of the Director of Economic Stabilization, filed another

[*] *Saginaw Broadcasting Co.* vs. *F. C. C.*, 96 F. (2d) 554.

petition asking that Order No. 2404 be amended. He asked that Order No. 2401 be vacated or at least stayed, and that the proceeding be reopened to afford the Director of Economic Stabilization an opportunity to intervene in this case without the limitations imposed in Order No. 2404 or the limitations imposed on the Price Administrator when he intervened in the original hearing.

1. The request of the Director, that if the order is not vacated, it should at least be stayed, it seems to me, should be granted as a matter of course. A denial of this request is contrary to the spirit of our statute. Paragraph 64 of our statute [37] provides that when an application for reconsideration is filed, the filing of the application itself shall act as a stay of the Commission's order; and if the application is granted, the stay must continue until the final disposition of the case. Apparently it was the Congressional intent that whenever the Commission hears a case, it should do so with an open mind, and that the petitioner have a fair opportunity to demonstrate

[37] "PAR. 64. That if at any time the commission shall be in doubt of the elements of value to be by them considered in arriving at the true valuation under the provisions of this section, they are authorized and empowered to institute a proceeding in equity in the Supreme Court of the District of Columbia petitioning said court to instruct them as to the element or elements of value to be by them considered as aforesaid, and the particular utility under valuation at the time shall be made party defendant in said action.

"That any public utility or any other person or corporation affected by any final order or decision of the Commission may, within thirty days after the publication thereof, file with the Commission an application in writing requesting a reconsideration of the matters involved, and stating specifically the errors claimed as grounds for such reconsideration. No public utility, or other person or corporation shall in any court urge or rely on any ground not so set forth in said application. The Commission, within thirty days after the filing of such application, shall either grant or deny it. Failure by the Commission to act upon such application within such period shall be deemed a denial thereof. If such application be granted the Commission, after giving notice thereof to all interested parties, shall, either with or without hearing, rescind, modify, or affirm its order or decision. The filing of such an application shall act as a stay upon the execution of the order or decision of the Commission until the final action of the Commission upon the application: *Provided*, That upon written consent of the utility such order or decision shall not be stayed unless otherwise ordered by the Commission. No appeal shall lie from any order of the Commission unless an application for reconsideration shall have been first made and determined."

the righteousness of his cause, without feeling that there is already an operative order staring him in the face. If the granting of an application for reconsideration by any person affected automatically stays the Commission's order, then *a fortiori* the granting of an original hearing to a petitioner of no lesser importance than the Director of Economic Stabilization, a statutory agent of the President of the United States, should not be beclouded by a previous order issued. While there is no express provision in the statute that the order be stayed pending this particular type of hearing it seems to me that the requirement of staying the order would flow by necessary implication from Paragraph 64 of our statute.

2. I think that the order should be vacated and the case reopened, because both Order No. 2401 and Order No. 2404 are erroneous, both as to the facts and the law of the case. I have set forth my reasons in the dissenting opinions filed with these orders. I repeat briefly the reasons stated therein in support of my view that the present petition should be granted, namely, that the Commission erred in the following particulars:

ERRORS AS TO PROCEDURE

I. The Commission has so far departed from the usual course of proper administrative procedure, and has so acted contrary to the rules of proper procedure, that it deprived the interveners and the public of a full and fair hearing, contrary to due process in its primary sense, in that

1. The Commission refused to postpone the hearing set for August 18, 1942, and to afford reasonable time to prepare testimony, despite the fact that it became evident at the prehearing conference, held only four days prior thereto, that neither the Company, nor the intervener, nor the Commission were prepared to develop the facts and the law of the case.

2. The Commission, acting without authority of law and contrary to law, granted the Company's motion to strike, and sustained objections to, questions asked by one of the Commissioners concerning the correctness of the rate base and concerning other matters necessary for a correct determination of the facts of this case.

3. The Commission, while granting the Price Administrator the right to intervene in the proceedings, at the same time hampered the intervener in developing the facts and the law of the case.

(a) By constantly limiting him to a purported "scope of hearing", which scope was so ill-defined that it was not and could not have been followed even by the Commission itself.

(b) By permitting Counsel for the Company to dominate the proceeding and constantly to annoy and interfere with Counsel for the intervener.

(c) By permitting officers of the Company to sneer and jeer at the spokesmen for the various citizens associations, and even at one of the Commissioners who sought to develop the facts of the case.

(d) By exhibiting such bias and prejudice to any view other than that favored by the Company as to question whether information furnished by the Commission's Chief Accountant to one of the Commissioners was furnished by him in his capacity as an accountant.

4. The Commission set up an indeterminate "scope of hearing" under the so-called sliding scale arrangement, excluded evidence on the theory that it went beyond the purported scope, except when the Washington Gas Light Company assented to have such evidence admitted, thus, in effect, surrendering to the Company the function and power to rule on admissibility of evidence.

5. The Commission excluded evidence, and afforded no opportunity to present evidence, relating to the correct rate base and to the proper amount of depreciation or retirement expense deductible from operating revenue, in the determination of just and reasonable rates chargeable by the Washington Gas Light Company.

6. The Commission, while purporting to grant a petition for intervention by the Price Administrator, acting in behalf of the Director of Economic Stabilization, has so limited the scope of his evidence as to render the intervention a nullity.

7. Orders Nos. 2401 and 2404 did not and do not represent the action of the Commission as a body corporate, but were

and are in truth and in fact the action of the Commissioners acting individually since.

(a) The Commission itself never considered the facts or the law of the case, prior to issuance of Orders Nos. 2401 and 2404, except the one question relating to the applicability of the Act of Congress of October 2, 1942, To amend the Price Control Act of 1942.

(b) No deliberations or conferences were had by the Commission to consider the facts and reasons set forth in the minority opinions relating to these orders.

(c) The Commission failed and refused to follow its own rule governing the issuance of orders and opinions in cases where there is a division within the Commission.

ERRORS AS TO THE RATE BASE

II. The Commission committed a number of prejudicial errors with respect to the rate base of the Washington Gas Light Company, to wit:

1. The Commission erred in failing to make basic findings which would lead to the conclusion as to what constitutes the proper rate base for determining just and reasonable rates, as required by law.

2. The Commission erred in arbitrarily assuming that the proper rate base was $28,088,332.

3. The Commission erred in failing to hold that the rate base of $28,088,332 was inflated by at least $1,055,549.52.

4. The Commission erred in holding that the computation of the rate base under the sliding scale arrangement governed the determination of just and reasonable rates in this case, irrespective of whether or not such rate base was factually and legally a proper rate base.

ERRORS AS TO DEDUCTIONS FROM OPERATING REVENUE

III. The Commission erred in a number of particulars with respect to the operating expenses deductible from operating revenues for the purpose of computing the net return, to wit:

1. In failing to make findings as to the basic facts which would show the amount of operating expenses properly allow-

able as deductions from operating revenue in the computation of just and reasonable rates.

2. In arbitrarily concluding that the operating expenses allowable as deductions totalled $7,301,988.67; and in arbitrarily concluding that all items aggregating this amount were in accordance with the Uniform System of Accounts prescribed by the Commission and constituted reasonable expenses.

3. In failing to hold that the Washington Gas Light Company had failed to prove that items aggregating $389,098.33, purporting to represent services on customers' premises, constituted operating expenses chargeable to Account No. 769 of the Uniform System of Accounts, rather than expenses connected with the Company's merchandising and jobbing department, chargeable to Account No. 520 of the prescribed System of Accounts, and not deductible as operating expense.

4. In failing to hold that the said items aggregating $389,098.33, representing services on customers' premises, were, according to Section 8 of Order No. 2098, issued August 26, 1941, chargeable to the individual customers, and not to the rate payers generally, and that, therefore, these amounts in question were not deductible as operating expense.

5. In holding, in effect, that items aggregating $216,072.27 were properly chargeable to promotional expenses; and in failing to disallow these items on the ground that the Company has failed to show

(a) That none of these items were chargeable to merchandising and jobbing;

(b) What part, if any, of these items constituted expenses for obtaining new business, as distinguished from keeping old customers.

6. In failing to find and to hold that a contribution in the sum of $1,668.30 made by the Washington Gas Light Company to the Institute of Gas Technology constituted a donation not chargeable to operating expenses.

7. In holding, in effect, that association dues and contributions, including those paid to propaganda organizations, were properly chargeable, in the sum of $975.00, as operating expense and deductible from gross revenue; and in failing to hold that these items are not chargeable to the rate payers.

because the Company had made no showing that these payments were made for the purpose of, and that they resulted in, the improvement of gas service to the public.

8. In holding that the salaries paid by the Washington Gas Light Company to its officers and executives were reasonable for rate-making purposes as charges against the rate payers; in failing to hold that the Company had made no showing as to the reasonableness of the amounts paid; in failing to hold that the amounts chargeable against the rate payers should not exceed the salaries paid to persons in the public service in positions requiring comparable amounts of work, effort, knowledge, and ability; and in failing to find and to hold that the salaries paid to officers and executives were at least $50,966.50 in excess of the reasonable amounts properly deductible from operating revenue for rate-making purposes.

9. In allowing capital stock taxes, totalling $48,155.11, as a deduction from operating revenue; and in failing to hold that capital stock taxes, being imposed on the privilege of doing business in corporate form, are payments which inure solely to the benefit of the stockholders, are not chargeable to the rate payers, and are, therefore, not deductible from operating revenue for rate-making purposes.

10. In finding, contrary to the evidence, that the income tax rate paid by the Company in 1941, namely 31%, constituted ordinary and normal income taxes deductible from gross revenue; in failing to find that 19% constituted the ordinary and normal rate, and that anything in excess of such rate constituted extraordinary and abnormal taxes imposed on the Company as its burden in the prosecution of the present war; in failing to hold that such taxes are not chargeable to the rate payers, and that the disallowance of the deduction should be increased by the additional sum of $143,706.30.

11. In failing to hold that an item of $439.05, paid for expenses in connection with work done for the Company on excess profits taxes, is not deductible from operating revenue.

12. In computing depreciation on the basis of the entire rate base, including non-depreciable property, and in computing depreciation expense as being 4% of the depreciation reserve, while permitting a rate of return of 6½% on the un-

depreciated rate base; in holding that the depreciation expense formula adopted in the sliding scale arrangement governed the amount of the deduction allowable as depreciation expense; in failing to hold that the formula adopted in the sliding scale arrangement was contrary to Paragraph 16 [*] of the statute; and in failing to hold that the allowance for depreciation expense should be reduced to $227,338.01.

ERRORS AS TO RATE OF RETURN

IV. The Commission failed to make any findings of basic facts which would lead to the conclusion that a return of 6½% of the undepreciated rate base, less 4% of the depreciation reserve, constituted a fair and reasonable return; and in failing to hold that, in the absence of evidence to the contrary, a return of 6% is ample as a fair and reasonable return under the present economic conditions.

ERRORS AS TO INCREASE IN RATES

V. The Commission erred in ordering an increase in rates totalling in excess of $200,000, without a finding to the effect that the existing rates are unreasonably low or confiscatory; in failing to find that the existing rates are unreasonably high or excessive and that the rates under the sliding scale arrange-

[*] "PAR. 16. That every public utility shall carry a proper and adequate depreciation account. The commission shall ascertain and determine what are the proper and adequate rates of depreciation of the several classes of property of each public utility. These rates shall be such as will provide the amounts required over and above the expense of maintenance to keep such property in a state of efficiency corresponding to the progress of the industry. Each public utility shall conform its depreciation accounts to such rates so ascertained and determined by the commission. The commission may make changes in such rates of depreciation from time to time as it may find to be necessary. The commission shall also prescribe rules, regulations, and forms of accounts regarding such depreciation which the public utility is required to carry into effect. The commission shall provide for such depreciation in fixing the rates, tolls, and charges to be paid by the public. All moneys in this fund may be expended in keeping the property of such public utility in repair and good and serviceable condition for the use to which it is devoted, or invested, and, if invested, the income from the investments shall also be carried into the depreciation fund. This fund and the proceeds thereof shall be used for no other purpose than as provided in this paragraph, unless with the consent and by order of the commission."

ment should be reduced in an amount totalling $617,874.36; in failing to hold that in view of changed conditions the sliding scale arrangement should not be applied and that the rates should be reduced in an amount totalling $1,009,207.04.

VIOLATION OF ACT OF OCTOBER 2, 1942

VI. In issuing its Order No. 2401, the Commission acted in disregard of and contrary to the Act of October 2, 1942, To amend the Price Control Act of 1942, in that

1. It issued an order directing an increase in rates without having the Company first give notice to the Director of Economic Stabilization and consent to his timely intervention.

2. It made the order retroactive to September 1, 1942.

3. It held in effect that the intervention previously granted to the Office of Price Administration constituted sufficient compliance with the Act of Congress, whereas in truth and in fact the intervention was so beset with limitations that it was rendered a nullity.

4. In issuing Order No. 2404, it failed to vacate Order No. 2401.

5. It failed to reopen the case for the purpose of permitting the Director of Economic Stabilization to develop the facts and the law of the case; for the purpose of requiring the Washington Gas Light Company to prove its proper rate base, proper allowances for operating expenses, reasonable allowances for taxes and reasonable deductions for depreciation; for the purpose of making specific findings of basic facts (based upon competent evidence), as distinguished from mere inferences or conclusions of fact; and for the purpose of arriving at conclusions of fact and law, which would be supported by proper findings.

6. By permitting the Director of Economic Stabilization to intervene for the purpose of adducing "evidence relating to the inflationary effect, if any, of the increase in rates authorized by Order No. 2401", without permitting him to go into all the facts and law pertaining to the rate determination in this case, the Commission imposed on him a meaningless and impossible task, thus in effect denying him the right to intervene.

Because of the above errors, I believe that both Orders Nos. 2401 and 2404 are void. Order No. 2401 should be vacated, and Order No. 2404 should be amended in accordance with the request of the Director of Economic Stabilization.

3. This brings me to the request made that the Director of Economic Stabilization be permitted to intervene, without the limitations imposed. What is the requirement of the statute? The Act of October 2, 1942, provides, in Section 1 thereof:

> The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, * * * to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided*, That no common carrier or other public utility shall make any general increase in rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice * * *.

In subsequent sections the Act sets out the exceptions to this great grant of power to the President to adjust prices to the extent *he finds necessary* for the purposes stated. Query: Does the above *proviso* also operate as an exception? We have been referred to statements made on the floor of both houses of Congress to the effect that this proviso does operate as an exception to the power granted to the President. These statements by members of the Congress would have constituted pertinent evidence of the collective Congressional intent, if the language of the statute were uncertain and ambiguous, but not when the language is so clear that it requires no resort to extraneous sources of interpretation.

Had Congress intended to make an exception to this grant of power in favor of common carriers and other public utilities, it would have undoubtedly used appropriate language to express such intent by including it among the other exceptions. The proviso is not an exception, and does not diminish the power granted to the President. It is an emphasis of an additional obligation. It is a direction that, while private persons may increase their prices subject to limitations which may be imposed by the President, the common carriers and other public

utilities may not do so without giving the required notice and consent to intervention, but still subject to limitations imposed by the President.

Thus Congress has not disturbed the powers and functions of the regulatory utility agencies, except to the extent that (1) it provided for intervention by the President's agent, and (2) it made utility rates, like any other prices, subject to the paramount power of the President to make adjustments to aid in the effective prosecution of the war or to correct gross inequities. Is it conceivable that Congress, in making this extraordinary grant of power to the President, intended that if he or his agent did seek to intervene, the regulatory authority may nevertheless show him the door? I cannot believe it. If this were to happen, the President could undoubtedly invoke his power under the Act of October 2nd, and make adjustments in rates which would correct such gross inequities.

Let us suppose, however, that the proviso did constitute an exception to the power granted to the President. Then the exception must be strictly construed. Can we then so construe it that by this exception Congress made the application of this Presidential power, granted in times of greatest stress, depend largely on the subordinate agencies of the Federal, State or even Municipal governments who could at will exclude or limit the intervention by the President or his agent? Whichever way one examines this statute, the conclusion is inescapable that the right of intervention is granted by the statute, not by the respective agencies, and, the statute contains no words of limitation on this right to intervene. It gives the Director of Economic Stabilization, as the agent of the President, the right to intervene in any case in which a rate increase is sought. The purpose of the intervention is to prevent any unjustifiable increase in rates. To this end he may show that an increase in rates would not be justifiable, that the existing rates are not unreasonably low or confiscatory, or that in view of present conditions the Company will be able to continue functioning and rendering service without an increase in rates. In a rate proceeding this opens the way to the examination of all elements entering into the rate determination, and if in the course of this proceeding it becomes evident that the existing rates are

unreasonably high, it becomes the duty of the regulatory authority to order a reduction in rates.

Has this Commission recognized the President's, or his agent's, right so to intervene? It limited his intervention to prove—what? That the increase ordered, the $200,000 will have an *inflationary effect!* It is indeed puzzling what this means.

At the hearing on the petition to amend Order No. 2404, the present Chairman disclosed what he meant by inflationary effect, by reading into the record the definition of the term "inflationary". It means giving rise to "disproportionate and relatively sharp and sudden increase in the quantity of money or credit, or both, relative to the amount of exchange business". In other words, the Chairman added, "when your dollar purchases less than it formerly did it is inflationary". Substituting this meaning for the words used in Section 1 of Order No. 2404, the Director of Economic Stabilization was permitted to intervene for the purpose of showing that upon the increase of gas rates by $200,000, the purchase value of the dollar will drop. It may well be assumed that such result will not follow from the increase ordered, not even if the Commission had ordered an increase many times as large.

If this were the meaning of the Act of October 2nd, that the Director may be permitted to intervene for such purpose, then Congress would be legislating something which is absurd. No public utility desiring to remain in the business will so increase its rates that the amount of the increase will lower the value of the dollar. No regulatory agency, no matter how deluded, will order such an increase. I cannot attribute to Congress such absurd result.

The most that can be expected from *any* increase in utility rates is an imperceptible inflationary *tendency*, rather than an inflationary *effect*. The Commission itself has used the words "inflationary effect" in this sense, when, in disallowing excess profits taxes in the sum of $43,928.02, it did so "in order to prevent the *direct inflationary effect* which such allowance would invite". Surely the Commission did not mean that if the $44,000 were allowed as a deduction from operating revenue, the purchasing value of the dollar would drop. Surely the

Commission did not mean that $44,000 would have a *direct inflationary effect*, while $200,000 could not conceivably "have material inflationary tendencies", as the Commission said.

But then the question arises: Why will $44,000 in taxes (least inflationary in character) have an inflationary tendency, while $200,000 in profits (most inflationary in character) will not? Upon what facts has the Commission concluded that the $44,000 would have an inflationary tendency? I find none in the record. It must then be that the Commission arrived at this conclusion as a matter of common knowledge. And rightly so, for while no inflationary tendency can be perceived from any given increase in prices, any increase in times like the present has a *tendency* to increase other prices, until there is a cumulative *effect* which when perceived has already done its destructive work. If the Commission can take judicial notice of the inflationary tendency of an increase in rates in the sum of $44,000, why can it not take judicial notice of the same result in an increase five times as great? The Commission cannot escape this dilemma by dividing the increase among all consumers and calling it an increase of 3¢ per month. If this increase in rates means the much publicized 3¢ per month per domestic consumer, then the $44,000 means ⅗ of 1¢ per domestic consumer; if the $200,000 means an increase of 1/37 of 1% in the cost of living index, then the $44,000 means an increase of 1/200 of 1% in the cost of living index.

Let us suppose, however, that there is some justification for the difference, i. e. for taking judicial notice of the inflationary tendencies of the $44,000 and for requiring proof as to the $200,000. Upon what evidence, upon what theory of proof, could such tendencies be attributed to the $200,000 increase allowed by Order No. 2401? I asked Counsel for the Company, Counsel for the Commission and Counsel for the Director of Economic Stabilization to outline the method of proof they would follow in order to show the inflationary tendencies or inflationary effects which this increase in rates would entail. None of them could give an answer. It was evident, upon the mere raising of the question, that the Commission assigned an impossible and meaningless task to the Director of Economic

Stabilization. As a matter of fact, it was not and is not the intention of the Commission to allow the Director of Economic Stabilization to intervene.

This also brings up the question whether the Company has actually complied with the provision of the Act of October 2nd, that it consent to the intervention. The evidence shows that, immediately upon the issuance of Order No. 2401, the Company addressed a letter to the Director of Economic Stabilization notifying him of the increase in rates. This letter contained no expression of consent to his intervention in this proceeding. On October 17th, the Company addressed another letter to the Director of Economic Stabilization in which it attempted to show that it had already assented to intervention by the Office of Price Administration in the original hearing, implying that the Company did not need to comply with the Act of October 2nd. It was only after the Commission had issued Order No. 2404, limiting the Director of Economic Stabilization to an impossible and meaningless task, that the Company, on October 30th, wrote a third letter, this time to the Commission, to the effect that it consented to intervention by the Director of Economic Stabilization. Asked whether this letter meant that the Company consented to an unlimited intervention by the Director of Economic Stabilization, or whether it meant that the consent was only to such intervention as was outlined in Order No. 2404, Counsel for the Company found great difficulty in giving an unequivocal answer. Finally the answer came that the Company's consent was for an intervention "without strings attached". It was evident to me, however, that the consent was a mere empty gesture, for the Company already knew that the Commission was not inclined to permit any intervention to the Director of Economic Stabilization which would develop all elements entering into rate making in the present proceeding.

As I said in my dissent on Order No. 2404, in discussing the Commission's duty under the Act of October 2, 1942: "Could the Commission then say: Let the Company give notice, let it consent to intervention by the Director of Economic Stabilization, we shall render the Act impotent by denying any petition to intervene or by so limiting the intervention as to render

it useless? To ask the question is to answer it." This is just what happened in this case. The Company's consent and the intervention allowed had only form, but no substance.

GREGORY HANKIN, *Commissioner.*

NOVEMBER 4, 1942.

Before the Public Utilities Commission of the District of Columbia

P. U. C. No. 3306, Formal Case No. 316

In the Matter of INVESTIGATION OF RATES, TOLLS, CHARGES, TARIFFS, RULES, REGULATIONS AND CONDITIONS FOR SERVICE OF THE WASHINGTON GAS LIGHT COMPANY

PETITION FOR RECONSIDERATION

Comes now, Leon Henderson, Price Administrator of the Office of Price Administration, on behalf of James F. Byrnes, Director of Economic Stabilization, an intervenor and a party affected by the order of the Commission herein, and moves that the Commission reconsider its orders of October 13, 1942, October 23, 1942, and November 9, 1942, in this proceeding, and in support thereof alleges the following errors:

1. The Commission erred in issuing its Order No. 2401 of October 13, 1942, without giving the Director of Economic Stabilization the opportunity of the notice required by the Act of October 2, 1942 (Pub. Law. 729; 77th Cong. 2d Sess.), amending the Emergency Price Control Act of 1942, and without giving the Director of Economic Stabilization the opportunity of timely intervention as permitted by said Act.

2. In issuing its Order No. 2404 of October 23, 1942, the Commission erred in restricting the Director of Economic Stabilization to the presentation of "additional evidence relating to the inflationary effect, if any, of the increase in rates authorized by Order No. 2401."

3. In issuing its Order No. 2404 of October 23, 1942, the Commission erred in refusing to reopen the proceeding for the purpose of receiving evidence and argument on behalf of the Director of Economic Stabilization.

4. In issuing its Order 2404 of October 23, 1942, the Commission erred in limiting the intervention and participation

of the Director of Economic Stabilization in this proceeding.

5. The Commission erred in its Order No. 2404 of October 23, 1942, and November 9, 1942, in not granting the request of the Director of Economic Stabilization that Order No. 2401 of October 13, 1942, be vacated.

6. The Commission erred in refusing to hold that the dominant principle governing the determination of the rates and charges of the Company is the government's program to control inflation, and to stabilize the cost of living by preventing all future avoidable increases thereof as provided by Congress in the Emergency Price Control Act of January 30, 1942, as amended by the Act of October 2, 1942, and as enunciated by the President in his Executive Order No. 9250 dated October 2, 1942, and the policies of the Director of Economic Stabilization and the Office of Price Administration.

7. The Commission erred in approving and ordering an increase in rates and charges in the absence of a clear and convincing showing that the Company would be subject to undue hardship if it continued to operate at existing rates.

8. The Commission erred in granting an increase in rates and charges since it appeared upon the Company's figures that after the deducting of all expenses, including excessive charges for depreciation expense and income taxes, the Company was earning substantially 5% upon the agreed undepreciated rate base and in failing to hold that this was an adequate return in the light of current economic conditions and the government's program to prevent inflation and to prevent further avoidable increases in the cost of living.

9. The Commission erred in approving and ordering an increase in the absence of a clear and convincing showing that existing rates and charges were unreasonably low.

10. The Commission erred in prescribing and approving increased rates and charges without a finding that presently effective rates and charges are unjust, unreasonable, unreasonably low and not sufficiently compensatory.

Wherefore petitioner prays that the Commission find, and so order upon reconsideration of its orders of October 13, 1942 October 23, 1942, and November 9, 1942; (1) That the order of October 13, 1942, in this proceeding should be vacated and

rescinded; (2) That the proceeding should be reopened for the purpose of receiving further evidence and hearing further argument herein; (3) that the Director of Economic Stabilization should be allowed the right of intervention without limitation, and should be permitted to file a brief in this proceeding; and that the Commission enter such further order or orders in the premises as to it may seem reasonable and just.

Respectfully submitted,

LEON HENDERSON
Price Administrator, Office of Price Administration
On Behalf of James F. Byrnes
Director of Economic Stabilization
By DAVID GINSBURG,
General Counsel
NATHANIEL L. NATHANSON
Assistant General Counsel
HARRY R. BOOTH
Utilities Counsel, Legal Division
Office of Price Administration

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing application for reconsideration upon all parties of record in this proceeding, by mailing by first-class mail a copy thereof properly addressed to each such party.

Dated at Washington, D. C., this 12th day of November, 1942.

HARRY R. BOOTH.

Public Utilities Commission of the District of Columbia

Order No. 2422, Formal Case No. 316

NOVEMBER 16, 1942.

In the Matter of RATES, TOLLS, CHARGES, TARIFFS, RULES, REGULATIONS, AND CONDITIONS OF SERVICE OF WASHINGTON GAS LIGHT COMPANY.

Upon careful consideration of the petition for reconsideration filed in this proceeding by Leon Henderson, Price Administrator of the Office of Price Administration, on behalf of James F. Byrnes, Director of Economic Stabilization.

It is ordered:

That the petition for reconsideration filed in this proceeding by Leon Henderson, Price Administrator of the Office of Price Administration, on behalf of James F. Byrnes, Director of Economic Stabilization, be, and the same is hereby, denied.

By the Commission. (Commissioner Hankin dissenting).

E. J. MILLIGAN
Executive Secretary.

A True Copy:

[SEAL] N. H. HETZEL
Chief Clerk.

AD.

In the District Court of the United States for the District of Columbia

Civil Action No. 17805

JAMES F. BYRNES, DIRECTOR OF ECONOMIC STABILIZATION, APPELLANT, BY LEON HENDERSON, PRICE ADMINISTRATOR OF THE OFFICE OF PRICE ADMINISTRATION

v.

JAMES H. FLANAGAN, GREGORY HANKIN, AND C. W. KUTZ, BEING THE PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, APPELLEES

SEPARATE ANSWER OF GREGORY HANKIN, APPELLEE

Now comes Gregory Hankin, a member of the Public Utilities Commission of the District of Columbia and one of the Appellees in the above-entitled cause, and appearing on behalf of himself says:

1. That he admits all and singular the allegations contained in the Petition of Appeal filed by James F. Byrnes, Director of Economic Stabilization, by Leon Henderson, Price Administrator of the Office of Price Administration;

2. That he agrees that Orders Nos. 2401, 2404 and 2418, issued by the Public Utilities Commission and appended as Exhibits A, C and E to the Petition of Appeal are illegal and void for the reasons set forth in the said Petition of Appeal and

for additional reasons included in the opinions of your Appellee dissenting from the said orders of the Commission.

Wherefore, your Appellee, in behalf of himself, confesses error on the part of the Public Utilities Commission and says that the relief sought by the petitioner should be granted, that the aforementioned orders of the Commission should be vacated and set aside, and that the cause be remanded to the Commission for further proceedings, with directions:

1. To afford to the Appellant full opportunity to intervene on all questions of law and fact pertaining to an orderly and proper disposition of the case;

2. To reopen the case for the presentation of further evidence on all issues of fact relating to the reasonableness of the rates charged by the Washington Gas Light Company; and

3. To make specific findings of fact and conclusions of law to the end that the Commission's order shall be supported by the findings, which in turn shall be supported by the evidence.

Respectfully submitted:

GREGORY HANKIN,

Commissioner, Public Utilities Commission of the District of Columbia,

Appellee.

Service of a copy of the foregoing Answer is hereby acknowledged this — day of December 1942.

——— ———, *Counsel for Appellant.*

This is to certify that I have this 8th day of December, 1942, mailed copies of this answer to the attorneys for the parties in this case.

GREGORY HANKIN.

Part II

PLEADINGS AND OTHER PAPERS DESIGNATED BY APPELLEE BROWN

Before the Public Utilities Commission of the District of Columbia

Formal Case No. 316

In the Matter of THE INVESTIGATION OF RATES, TOLLS, CHARGES, TARIFFS, RULES, REGULATIONS, AND CONDITIONS OF SERVICE OF THE WASHINGTON GAS LIGHT COMPANY.

PETITION FOR LEAVE TO INTERVENE

May It Please The Commission:

Leon Henderson, Price Administrator for the Office of Price Administration, respectfully petitions for leave to intervene, and in support thereof, makes the following representations:

1. Petitioner is Price Administrator of the United States, and Administrative Officer of the Federal Government, with offices in Washington, D. C. This office was created by the Emergency Price Control Act of 1942 (Pub. L. 421, 77th Cong.,) for the purpose, among others, of:

(a) Stabilizing prices and preventing speculative unwarranted and abnormal increases in prices,

(b) Eliminating and preventing profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions and scarcities caused by or contributing to the national emergency.

(c) Assuring that defense appropriations are not dissipated by excessive prices.

(d) Protecting persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent upon life insurance, annuities and pensions, from undue impairment of their standard of living; and

(e) Preventing a post-emergency collapse of values.

(Section 1 (a) of the Emergency Price Control Act of 1942.)

2. The program of the Office of Price Administration to stabilize commodity prices and costs of living is essential to the success of the war effort.

3. In accordance with the purposes of the Emergency Price Control Act, the Office of Price Administration has undertaken to stabilize commodity prices and the cost of living throughout the country by a series of Maximum Price Regulations. Indeed, general price increases have appeared to be such a grave threat to the efficient production of war materials and to the stability of the national income, that the Office of Price Administration, within the limits of statutory authorization has established maximum selling prices for all commodities and services. The immediate purpose of such regulation is to guarantee to the American people that every living cost will remain stable, and that the cycle of increasing prices, increasing wages, leading to disastrous inflation, may be averted. That is a prerequisite to the further measures which are necessary to insure war-time stability in the economy. Stable living cost means stability in the real wages of the worker. Increases in the cost of living bring about the need for a constant revision of wage contracts, constant bargaining and negotiations, and the certain prospect of interrupted production; normal collective bargaining processes are strained, perhaps broken, and war production is threatened with being shackled, disrupted, or even paralyzed.

4. Washington Gas Light Company (hereinafter sometimes referred to as the Company) is a public utility engaged in the business of supplying gas service to domestic, commercial, and industrial consumers in the District of Columbia at rates and charges which are subject to the jurisdiction of the Public Utilities Commission of the District of Columbia (hereinafter sometimes referred to as the Commission).

5. It appears that payments for gas service represent a regular item in the cost of living of a vast majority of residents in the District of Columbia.

6. By its order of December 13, 1935, the Commission established a sliding-scale arrangement for determining the rates and charges which the Company shall be allowed to demand and collect for supplying such gas service.

7. Pursuant to the provisions of said sliding-scale arrangement the Commission has entered upon an investigation for

the purpose of determining among other things, the amount to be applied for the decrease or increase of rates during the "Rate Year" commencing September 1, 1942, and has directed that a hearing be held thereon commencing August 18, 1942.

8. Washington Gas Light Company contends that its net earnings during the fiscal year (Test Year) ended June 30, 1942, were approximately $464,000 less than it was entitled to earn under the provisions of said sliding-scale arrangement. It, therefore, seeks to have an increase of approximately $387,122 applied during the "Rate Year" commencing September 1, 1942, and requests that its schedule of rates be adjusted accordingly.

9. It is contended by the Company that according to the provisions of said sliding-scale arrangement of December 13, 1935, the Company is entitled to such increase in rates and charges to compensate it for the difference between the actual return earned during the last fiscal (Test) year and the return which it was permitted to earn under the arrangement.

10. It appears that the claimed deficit in earnings during the past fiscal year is predicated in large part upon alleged estimated increases in federal income taxes levied or to be levied upon income received in the period from July 1, 1941, to June 30, 1942, over the preceding year.

11. The approval of an increase in utility rates because of increased federal income taxes would be contrary to the intention of the Congress, inflationary in character and adversely affect the program and policies of the Office of Price Administration to stabilize prices.

12. It appears that this is the first time since the United States entered the war that the Commission is called upon to make a determination or to fix rates under said sliding-scale arrangement. The application of the arrangement should be reconsidered in the light of the Government's program to prevent inflation and to stabilize the cost of living.

13. The question of under what circumstances rates and charges for gas service, should be increased during this period of national emergency resulting from the war, is one of basic national importance, in which the Office of Price Administration has a substantial interest.

Now, therefore, your petitioner prays that the Commission enter an order granting him leave to intervene and become a party to this proceeding.

Respectfully submitted,

LEON HENDERSON
Price Administrator
Office of Price Administration
By: DAVID GINSBURG
General Counsel
HARRY R. BOOTH
Utilities Counsel

Before the Public Utilities Commission of the District of Columbia

P. U. C. No. 3305, Formal Case No. 316

In the Matter of INVESTIGATION OF RATES, TOLLS, CHARGES, TARIFFS, RULES, REGULATIONS AND CONDITIONS OF SERVICE OF THE WASHINGTON GAS LIGHT COMPANY.

PETITION FOR THE REOPENING OF THE PROCEEDING FOR THE PURPOSE OF RECEIVING ADDITIONAL TESTIMONY

On August 18, 1942, the Commission granted the Price Administrator of the Office of Price Administration (sometimes hereinafter referred to as Petitioner) leave to intervene and become a party to this proceeding.

On September 14, 1942, counsel for the Price Administrator of the Office of Price Administration, in consideration of the several statements of the Commission as to the scope of the matters at issue in this proceeding, orally moved the Commission to issue appropriate orders under which the Commission could, in this proceeding, reconsider the provisions of the "sliding-scale arrangement" in the light of present economic conditions, and could consider all factors ordinarily deemed necessary to a determination of just and reasonable rates and charges for service rendered by public utilities (Tr. 788–796).

Such motions were taken under advisement by the Commission (Tr. 796). However, the hearings were concluded on September 14, 1942, and the Commission has not made any ruling upon said motions.

Wherefore, your Petitioner renews said motions and respectfully requests that the Commission issue appropriate orders to:

Reopen this proceeding and direct that further evidence be taken with respect to:

1. The effect of present changed economic conditions upon the provisions of the "sliding-scale arrangement" made in 1935.

2. The necessity for revision of the provisions of the "sliding-scale arrangement" because of present economic conditions, particularly those provisions which relate to rate of return and the allowance of federal income taxes as an operating revenue deduction.

3. The relationship and effect of the Federal Government's program to control inflation and stabilize the cost of living to the "sliding-scale arrangement" and the proceeding.

4. All other factors which are ordinarily necessary to a proper determination of the justness and reasonableness of the rates and charges of a public utility.

Respectfully submitted,

LEON HENDERSON
Price Administrator
Office of Price Administration
By: DAVID GINSBURG
General Counsel
HARRY R. BOOTH
Utilities Counsel

Before the Public Utilities Commission of the District of Columbia

P. U. C. 3305, Formal Case No. 316

In the Matter of INVESTIGATION OF RATES, TOLLS, CHARGES, TARIFFS, RULES, REGULATIONS AND CONDITIONS OF SERVICE OF THE WASHINGTON GAS LIGHT COMPANY.

PETITION FOR RECONSIDERATION

Comes now, Leon Henderson, Price Administrator of the Office of Price Administration, an intervenor and a party affected by the order of the Commission herein, and moves that

the Commission reconsider its order of October 13, 1942, in this proceeding, and in support thereof alleges the following errors:

1. The Commission erred in refusing to hold that the dominant principle governing the determination of the rates and charges of the Company is the government's program to control inflation, and to stabilize the cost of living by preventing all future avoidable increases thereof.

2. The Commission erred in approving and ordering an increase in rates and charges in the absence of a clear and convincing showing that the Company would be subject to undue hardship if it continued to operate at existing rates.

3. The Commission erred in granting an increase in rates and charges since it appeared upon the Company's figures that after the deduction of all expenses, including excessive charges for depreciation expense and income taxes, the Company was earning substantially 5% upon the agreed undepreciated rate base, and in failing to hold that this was an adequate return in the light of current economic conditions and the government's program to prevent inflation and to prevent further avoidable increases in the cost of living.

4. The Commission erred in approving and ordering an increase in rates and charges in the absence of a clear and convincing showing that existing rates and charges were unreasonably low.

5. The Commission erred in prescribing and approving increased rates and charges without a finding that presently effective rates and charges are unjust, unreasonable, unreasonably low and not sufficiently compensatory.

6. The Commission erred in entering the order of October 13, 1942, without a showing that the Company had complied with Section 1 of the Act of October 2, 1942, amending the Emergency Price Control Act of 1942, and with full knowledge that the Company had failed to give the required notice to and consent to intervention by the Director of Economic Stabilization at the time of the entry of the order of October 13, 1942.

7. The Commission erred in denying the motion of the Price Administrator, filed on his own behalf, requesting that this proceeding be reopened and that further evidence be taken with respect to: (1) The effect of present changed economic condi-

tions upon the provisions of the sliding-scale arrangement made in 1935; (2) the necessity for revision of the provisions of the sliding-scale arrangement because of present economic conditions, particularly those provisions which relate to rate of return and the allowance of Federal income taxes as an operating revenue deduction; (3) the relationship of the Federal Government's program to control inflation and stabilize the cost of living to the sliding-scale arrangement and this proceeding; and (4) all other factors which are necessary to a proper determination of the justness and reasonableness of the rates and charges of a public utility.

8. The Commission erred in limiting the issues and in otherwise restricting the scope of this proceeding and thereby denied the petitioner, and other intervenors, a full and fair hearing.

9. The Commission erred in fixing and prescribing increased rates and charges to be made effective retroactively as of September 1, 1942, without statutory authority to make any rates and charges effective as of a date prior to the approval thereof.

10. The Commission erred in ruling "that questions pertaining to basic elements of the sliding-scale arrangement described in Order No. 1458, dated December 13, 1935, are not within the scope of the present proceeding". (Tr. 475).

11. The Commission erred in ruling that it might give particular and individual consideration to the propriety of allowing excess profits tax or income tax as an operating expense although the sliding-scale arrangement does not specifically provide therefor, but that it could not reconsider other phases of the sliding-scale arrangement.

12. The Commission erred in limiting the rights of the petitioner, as an intervenor and a party to the proceeding, to present evidence.

13. The Commission erred in not ruling upon petitioner's oral motion made during the course of hearing which requested that, if the Commissioner be of the opinion that the order instituting this proceeding did not permit an inquiry into the basic provisions of the sliding-scale arrangement, the Commission issue appropriate orders so that the provisions of the sliding-scale arrangement might be reconsidered in the light of present economic conditions and in the light of the govern-

ment's program to stabilize the cost of living, and in the light of all other necessary factors which the Commission must as a matter of law consider in determining just and reasonable rates and charges of a public utility.

14. The Commission erred in finding that an "increase for all customers" of "2.28% in excess of rates for the preceding year" would not have "material inflationary tendencies".

15. The Commission erred in not requiring the company to sustain the legally imposed burden of proving the presently effective rates and charges to be unjust and unreasonable under existing circumstances and not sufficiently compensatory under accepted rate-making principles, and of proving the increased rates and charges to be just and reasonable.

16. The Commission erred in ruling that the rights of the Price Administrator, as an intervenor, did not permit him to "carry on a detailed investigation into the accounts of the gas company". (Tr. 476).

17. The Commission erred in ruling that its primary responsibility and duty is "to determine, in accordance with the provisions of the sliding-scale arrangement as such arrangement is now constituted, whether the Washington Gas Light Company is entitled to an increase in rates for the year commencing September 1, 1942, and the amount of such warranted increase."

18. The Commission erred in finding the proper rate base to be $28,088,322.57, and in failing to make the basic findings necessary to a determination of any proper rate base.

19. The Commission erred in failing to deduct accrued depreciation from the rate base.

20. The Commission erred in not re-examining, determining and making proper findings as to the previously determined rate base in the light of the principles enunciated by the United States Supreme Court.

21. The Commission erred in finding that because "the sliding-scale arrangement does not attempt to define operating expenses or to indicate that certain types of operating expenses should be excluded in determining the net amount available for return", operating expenses of the company could

be adjusted only "for any accounting departures during the test year; for over or under accruals in taxes, uncollectible bills, and such other accrued accounts for which adjustment is provided by the prevailing accounting classification; and to exclude those expenses allocated to gas service outside of the District of Columbia".

22. The Commission erred in finding that "the calculation of Federal income taxes for the test year under consideration (July 1, 1941, through June 30, 1942) at the rate of 31% is reasonable".

23. The Commission erred in allowing as an operating expense a charge for income tax computed at a rate in excess of 19% which was the highest rate in effect for the "normal years" 1936–1939, inclusive.

24. The Commission erred in finding "Adjusted Operating Expenses" for the year ended June 30, 1942, to be $7,301,988.67 and in failing to make the necessary basic findings with respect to the amounts of specific operating expenses properly allowable as deductions from operating revenue.

25. The Commission erred in allowing as a proper operating expense charge an amount of $216,072.27 for sales promotion expense without positive and convincing proof that the items included constitute expenses incurred in the sale of gas service and not the sale of other merchandise.

26. The Commission erred in allowing as a proper operating expense charge an amount of $389,098.33 for services on customers' premises in the District of Columbia without positive and convincing proof that the items included constitute services other than those rendered in connection with merchandising and jobbing.

27. The Commission erred in finding that the operating expenses of the company for the test year ended June 30, 1942, except the adjustments made by the Commission in its opinion, "are fair and reasonable and properly considered in the determination of rates under the sliding-scale arrangement".

28. The Commission erred in finding "Adjusted amount available for return" for the year ended June 30, 1942, to be $1,555,051.65.

29. The Commission erred in finding $1,825,740.97 as the proper return to be allowed, without evidence to support such a finding.

30. The Commission erred in finding a deficiency of $270,689.32 in return, without evidence to support such a finding.

31. The Commission erred in finding $201,424.74 to be the "Net amount available for rate increase", without evidence to support such a finding.

32. The Commission erred in not determining whether existing charges for depreciation expense were burdensome and unfair to the rate payers; in not conforming the method and charges for depreciation expense to the legal principles announced in the decision of the Supreme Court in the case of Natural Gas Pipeline Company vs. Federal Power Commission; in computing depreciation expense on a rate base which included non-depreciable property, in contravention of established legal and accounting principles and regulations; in allowing the Company a sum for depreciation expense which, according to the evidence, is improperly computed both by acceptable accounting and legal standards; in refusing to permit testimony to be given on the subject by its Chief Accountant, Mr. McElfresh, or the witness Mr. Joseph, presented by the Office of Price Administration.

33. The Commission erred in prescribing 6½ per cent as the proper rate of return which the company should be permitted to earn without having any evidence before it upon which to reach such a decision.

34. The Commission erred in not re-examining in the light of present changed economic conditions the provisions of the sliding-scale arrangement of 1935 which specify "the primary" rate of return of 6½ per cent per annum, "since what would have been a proper rate of return for capital invested in gas plants and similar public utilities a few years ago furnishes no safe criterion for the present or for the future."

35. The Commission in adhering to the 6½-percent rate of return found to be proper in 1935, ignores the fact that "A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally", and

erred in not requiring the presentation of evidence concerning present economic conditions.

36. The Commission erred in finding "that the credit position of the Washington Gas Light Company depends in large measure upon the integrity of this Commission in administering the sliding-scale arrangement".

37. The Commission erred in ruling that "This proceeding is vastly different from a proceeding involving a rate case as that term is generally understood" (Tr. 475).

38. The Commission erred in refusing to allow the petitioner to present and elicit evidence in conformity with ordinarily accepted rate-making principles for the purpose of showing whether the presently effective rates and charges of the company are just and reasonable, which evidence is necessary to a showing and determination as to whether increases thereof are inflationary or would have an inflationary effect.

39. The Commission erred in not availing itself of the "right and power" conferred by Paragraph 18 of Section 8 of the Act of March 4, 1913 (37 Stat. 974), "to make such other and further changes in rates, charges, and regulations as the commission may ascertain and determine to be necessary and reasonable, and the right to alter or amend all orders relative thereto is reserved in the commission notwithstanding any such (sliding-scale) arrangement and actual agreement".

40. The Commission erred in ruling that its duty and responsibility required strict adherence to the provisions of the sliding-scale arrangement, as construed, to the neglect of its duty and responsibility to the gas consuming public to require the company to maintain just and reasonable rates and charges.

Wherefore, petitioner prays that the Commission find, upon reconsideration of its order of October 13, 1942, and the available evidence of record in support thereof, that the presently effective rates and charges have not been proved to be unjust and unreasonable, and that no increase in the presently effective rates and charges of the Washington Gas Light Company has been proved to be just and reasonable; that the order of October 13, 1942, should be vacated, and so order; and that the

Commission enter such further order or orders in the premises as to it may seem reasonable and just.

Respectfully submitted,

LEON HENDERSON
Price Administrator
Office of Price Administration
By DAVID GINSBURG
General Counsel
NATHANIEL L. NATHANSON
Assistant General Counsel
HARRY R. BOOTH
Utilities Counsel
Legal Division, Office of Price Administration.

Public Utilities Commission of the District of Columbia

Order No. 2423, Formal Case No. 316

NOVEMBER 16, 1942.

In the Matter of RATES, TOLLS, CHARGES, TARIFFS, RULES, REGULATIONS AND CONDITIONS OF SERVICE OF WASHINGTON GAS LIGHT COMPANY.

Upon careful consideration of the petition for reconsideration filed in this proceeding by Leon Henderson, Price Administrator of the Office of Price Administration,

It is ordered:

That the petition for reconsideration filed in this proceeding by Leon Henderson, Price Administrator of the Office of Price Administration, be, and the same is hereby, denied.

By the Commission. (Commissioner Hankin dissenting).

E. J. MILLIGAN
Executive Secretary.

A True Copy:

[SEAL]
AD.

N. H. HETZEL, *Chief Clerk.*

In the District Court of the United States for the District of Columbia

Civil Action No. 17806

LEON HENDERSON, PRICE ADMINISTRATOR OF THE OFFICE OF PRICE ADMINISTRATION, APPELLANT,

v.

JAMES H. FLANAGAN, GREGORY HANKIN, AND C. W. KUTZ, BEING THE PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, APPELLEES

SEPARATE ANSWER OF GREGORY HANKIN, APPELLEE

Now comes Gregory Hankin, a member of the Public Utilities Commission and one of the Appellees in the above-entitled cause, and appearing on behalf of himself files this answer:

1. That he admits all and singular the allegations contained in the Petition of Appeal filed by Leon Henderson, Price Administrator of the Office of Price Administration;

2. That he agrees that Order No. 2401, issued by this Commission on October 13, 1942, purporting to increase the rates of the Washington Gas Light Company is illegal and void for the reasons set forth in the said Petition of Appeal and for additional reasons set forth in the opinions of your Appellee dissenting from said Order No. 2401 and Orders Nos. 2404 and 2418, issued on October 23 and November 9, 1942, respectively.

Wherefore your Appellee on behalf of himself confesses error on the part of the Public Utilities Commission and says that the relief sought by the Appellant should be granted, that the said orders of the Commission be vacated and set aside, and that the cause be remanded for further proceedings with directions:

1. To reopen the case for the presentation of further evidence on all questions of fact relating to the reasonableness of the rates charged by the Washington Gas Light Company; and

2. To make specific findings of fact and conclusions of law to the end that the Commission's order shall be supported by the findings, which, in turn, shall be supported by the evidence.

Respectfully submitted.

GREGORY HANKIN
Commissioner
Public Utilities Commission of the District of Columbia, Appellee.

This is to certify that I have this 8th day of December 1942 mailed copies of this answer to the attorneys for the parties in this case.

GREGORY HANKIN.

In the District Court of the United States for the District of Columbia

Civil Action No. 17805

JAMES F. BYRNES, DIRECTOR OF ECONOMIC STABILIZATION, APPELLANT, BY LEON HENDERSON, PRICE ADMINISTRATOR OF THE OFFICE OF PRICE ADMINISTRATION,

v.

JAMES H. FLANAGAN, ET AL., APPELLEES

ANSWER TO PETITION OF APPEAL AND MOTION TO DISMISS

Come now James H. Flanagan and C. W. Kutz, being members of and constituting a majority of the Public Utilities Commission of the District of Columbia, Appellees in the above-entitled action, and for answer to the Petition of Appeal in the said action, the said Appellees, and each of them, say:

1. They admit that the Washington Gas Light Company did not give notice to the Director of Economic Stabilization of the proposed increase in rates authorized by the order dated October 13, 1942 (Order No. 2401), prior to the promulgation of the said order, but that on October 15, 1942, after the said order had been promulgated, the said Company did file with the Director of Economic Stabilization a notice of the proposed increase in rates and charges and later consented to the intervention of the Director of Economic Stabilization in the pro-

ceedings before the said Commission. They admit that on October 19, 1942, the Director of Economic Stabilization, by Leon Henderson, Price Administrator of the Office of Price Administration, filed a petition with the Public Utilities Commission, praying that the order dated October 13, 1942, be vacated, that the proceeding be reopened for the purpose of receiving further evidence and hearing further argument, and that the Appellant herein be allowed to intervene and to file a brief in such reopened proceedings. They admit that by order dated October 23, 1942, the Appellant was given the opportunity of presenting evidence and that he was permitted to intervene in the reopened proceedings for such purpose. They admit that on October 31, 1942, the Appellant filed a petition, praying that the Commission amend its Order No. 2404, dated October 23, 1942, and grant the relief prayed for in the petition filed October 19th. They admit that on November 12, 1942, the Appellant filed with the Commission a petition for reconsideration, which petition was denied by order dated November 16, 1942 (Order No. 2422).

2. They deny all the remaining allegations contained in the said Petition of Appeal.

3. They aver that the petition filed by Appellant on October 31, 1942, praying for an amendment of the order of October 23, 1942, and to provide the specific relief requested in the petition filed by the Appellant on October 19th, was denied by verbal ruling at the hearing on November 2nd (transcript of record, pages 1086–1087), and that the Commission's order of November 9, 1942 (Order No. 2418), was promulgated by the Commission after consideration of the record of the second reopened proceedings upon the petition of Appellant, in which the Commission denied the petition filed by Appellant on October 19th to vacate Order No. 2401.

4. (a) For further answer to the Petition of Appeal, the said Appellees aver that the Public Utilities Commission started a complete inventory and valuation of the properties of the Washington Gas Light Company, The Georgetown Gaslight Company (later merged with Washington Gas Light Company) in March, 1932, and after public hearings, analyses, and investigation, issued its valuation reports on March 19,

1935, in Orders Nos. 1341 and 1342, finding and establishing the fair value of the properties of the said companies as of June, 1932. Thereafter the Commission began further valuation proceedings for the purpose of bringing to date the valuation of the property of the Washington Gas Light Company for the purpose of establishing a sliding-scale plan, pursuant to the provisions of Paragraph 18 of the Act creating the Commission (37 Stat. 974, 980, section 43–317, D. C. Code, 1940), and that, pursuant to such investigations and proceedings and after public hearings extending through the months of June, July, August, and October, 1935, consisting of 5,951 pages of testimony and a total of 135 exhibits, the Commission made its findings and promulgated Order No. 1458 under date of December 13, 1935, wherein a sliding scale plan was established and defined pursuant to the provisions of Paragraph 18 of the said Act. The valuation and rate proceedings leading up to the establishment of the rate base of the Washington Gas Light Company and the sliding scale plan cost the parties more than $750,000.00, and as a result thereof gas rates in the District of Columbia were reduced in the year 1935 more than $800,000.00, which reduction has continued in effect since 1935, and that by the application of the sliding scale plan since its establishment in 1935 there have been smaller rate reductions in each of the years 1936, 1938, 1939 and 1940, which reductions have continued in effect since they were made, and under the terms and provisions of the plan the operating experience of the Washington Gas Light Company for the test year beginning July 1, 1941, to June 30, 1942, for the first time since the plan has been in effect requires an increase in the rates and charges for gas service in the District of Columbia. Under the provisions of the sliding scale arrangement, the operating experience of the Washington Gas Light Company for the test year, which is defined in the plan to be from July 1st to June 30th preceding a new rate year, which begins September 1st, constitutes the basis for determining the net amount available for rate reductions or increases as the operating experience warrants. Inasmuch as there was no rate reduction for the rate year beginning September 1, 1941, the rates in effect prior to the issuance of Order No. 2401, dated October 13, 1942, were based upon the

operating experience of the Company for the test year beginning July 1, 1939, and ending June 30, 1940.

(b) The said Appellees further aver that the sliding scale arrangement requires the Commission to make annual findings of the rate base of the property of the Gas Light Company, which has been done each year since the plan was put into effect in 1935. The plan provides that, beginning with the rate base established in 1935, there shall be added thereto each year the net additions and betterments of property installed during the test year at actual cost, and that the rate base found by the Commission in Order No. 2401 constitutes a fair value of the property of the Washington Gas Light Company for rate-making purposes, based upon the actual fair value found after three years of investigation and study, plus the net additions and betterments since that time at actual cost of the property.

(c) The said Appellees aver that, pursuant to the provisions of the sliding scale plan, the Commission by Order No. 2219, dated March 20, 1942, ordered that an engineering and accounting investigation be made relative to the rates, tolls, charges, tariffs, rules, regulations and conditions of service of the Gas Light Company, and that the engineering and accounting staffs of the Commission conducted such detailed and thorough analyses of all the books and accounts of the Washington Gas Light Company during a period beginning in the month of April and extending into the month of August 1942. Pursuant to the provisions of the sliding scale arrangement and the order of investigation, the Commission, under date of July 21, 1942, gave statutory notice of a public hearing to be held beginning on August 18, 1942, "relative to the rates, tolls, charges, tariffs, rules, regulations, and conditions of service of the Washington Gas Light Company, to become effective September 1, 1942, in accordance with the sliding scale arrangement established by Order No. 1458".

(d) Further answering, the said Appellees aver that prior to the public hearing in the proceedings the Commission held a prehearing conference on August 14th, which was attended by the Commission's staff and counsel, and utilities counsel of the Office of Price Administration. Pursuant to the notice dated July 21st, public hearings began on August 18th, at which time

the Office of Price Administration, through its utilities counsel and with the consent of the Washington Gas Light Company, was permitted to intervene in the proceedings before the Commission within the scope of the issues raised by the order of investigation dated March 20th and the statutory notice dated July 21st stating the time, place and the matters to be investigated, all in accord with the Rules of Practice and Procedure before the Commission. The said Appellees further aver that the hearings continued on August 19th, at which time utilities counsel of the Office of Price Administration asked that the proceedings be continued to permit him time to prepare for cross-examination of witnesses and for the preparation of testimony to be adduced by him; that pursuant to such request the hearing was continued to September 4th, at which time the hearing was reconvened and continued on September 8th, 11th, and 14th, at which time the record was closed and the parties were given until September 25th to file briefs, and that utilities counsel of the Office of Price Administration filed a brief with the Commission on that date.

(e) Further answering, the said Appellees aver that upon the petition of others the said proceedings were reopened on September 30th, in which proceeding utilities counsel for the Office of Price Administration participated and on that date filed a second brief, and the record was closed for the second time on September 30th, prior to the enactment of the Act of October 2, 1942, amending the Emergency Price Control Act of 1942, and prior to the appointment of the Appellant as Director of Economic Stabilization.

(f) They further aver that under date of October 13, 1942, the Commission issued its Order No. 2401, which established new rates and charges for gas service in the District of Columbia for the rates year which began September 1, 1942, in accordance with the terms and provisions of the sliding scale arrangement, and that on October 15, 1942, after the enactment of the Act of October 2nd, the Washington Gas Light Company served upon the Appellant herein notice of the increase in rates authorized by Order No. 2401 and served upon him a copy of the said order. They further aver that thereafter, to wit, on October 19th, the Price Administrator of the Office of Price Administra-

tion, on behalf of the Appellant herein, through the same utilities counsel who had appeared in all proceedings before the Commission, cross-examined witnesses, introduced certain testimony and filed briefs, filed a petition with the Commission, in which it was asserted that the issuance of the order of October 13, 1942, without notice to the Director of Economic Stabilization and without permitting him opportunity to intervene in the proceedings, constituted a denial of his right to appear "for the purpose of presenting evidence or argument concerning the comprehensive national economic policy developed in accordance with the provisions of the Emergency Price Control Act of 1942, as amended by the Act of October 2, 1942, and the effect thereon of increases in rates and charges of common carriers or other public utilities", and prayed that the order of October 13th be vacated, that the proceedings be reopened and the Director of Economic Stabilization be allowed to intervene in the reopened proceedings. Pursuant to such petition, the Appellees aver that by Order No. 2404 the Commission reopened the proceedings "for the purpose of receiving from the Office of Price Administration, on behalf of the Director of Economic Stabilization, additional evidence relating to the inflationary effect, if any, of the increase in rates authorized by Order No. 2401", granted intervention for such purpose and reopened the proceedings for further hearing on November 2nd. The said Appellees further aver that counsel for the Appellant was not ready to present testimony in accordance with the request contained in the petition of October 19th in pursuance to Order No. 2404, and asked that the hearing be continued until November 4th to permit counsel to consult with his associates as to what further steps they would take in the proceeding; that at the hearing on November 4th counsel for the Appellant called to the witness stand an official of the Washington Gas Light Company as Appellant's only witness in the reopened proceeding; that the only testimony adduced by the said witness was to the effect that the amount used by the Washington Gas Light Company for Federal income taxes in its determination of the amount available for rate increase under the sliding scale plan was overstated by approximately $18,000.00; that this overstatement was due to the fact that

the Revenue Act of 1942, which had not become law at the time Order No. 2401 was promulgated, contained a provision exempting from surtaxes that portion of the Company's income paid out as preferred stock dividends, which provision was not included in the draft of the Revenue Act then before the two Houses of Congress.

(g) Further answering, the said Appellees aver that the testimony offered on behalf of the Appellant herein was not responsive to the purposes stated in his petition to reopen the proceedings before the Commission or the provisions of Order No. 2404, for the reason that the Commission in its Order No. 2401 did not accept the computation for Federal income taxes accrued on the Company's books or as stated by the witness for the Commission and that instead the Commission in its determination of rates excluded from Federal income taxes approximately $130,000.00 more than the amount shown in the Company's statement for Federal income taxes.

(h) Further answering, the said Appellees aver that the program of the Federal Government to stabilize the cost of living contemplates consideration of the increase in wage rates, and that the operating experience of the Washington Gas Light Company during the test year from July 1, 1941, to June 30, 1942, upon which the rates authorized by Order No. 2401 are predicated, shows that the Washington Gas Light Company had increases in wage rates of approximately $380,000.00 in addition to increases in other costs of production and distribution of gas, and that the increase in cost of wages was approximately $180,000.00 in excess of the total increase in rates authorized by Order No. 2401.

(i) Further answering, the said Appellees aver that the total increase in rates authorized by Order No. 2401 is only 2.28% in excess of rates that have been in existence since September 1, 1940, and that the cost of gas constitutes only 1.17% of the average cost of living in the District of Columbia, according to statistics of the Labor Department, and that, based upon the percentage increase for gas service authorized by Order No. 2401, the cost of living index would be increased by only about 1/37 of 1%; and that such increase based upon the cost of production and distribution and the cost of labor does

not tend to inflation. Further answering the said allegations, the said Appellees aver that the gas rates in effect prior to the promulgation of Order No. 2401 were based upon operating experiences of the Washington Gas Light Company for the period of July 1, 1939, to June 30, 1940, a period long prior to the Government's efforts to stabilize prices, and at a time when living costs were increasing and labor wages were being raised by approval of Governmental agencies. Further answering, the said Appellees aver that, under the rates authorized by Order No. 2401, domestic consumers using 2,500 cubic feet or less of gas per month will sustain no increase in the cost of gas, and that the average increase for all customers will be only $.03 per month; that the average increase for all space heating customers for a heating season will be only $.57 per month for a period of eight months, and that the average increase for commercial and industrial customers will be only $.46 per month. Further answering, the said Appellees aver that in its determination in Order No. 2401 the Commission gave careful consideration to all factors bearing upon the case, including the credit position of the Washington Gas Light Company under the sliding scale plan (page 11) and the ability of the Company to secure capital economically for the purpose of expanding its plant to meet demands caused by war conditions, and the ability of the Company to provide the nation's No. 1 defense area with adequate gas service (page 10).

(j) The said Appellees aver that the Chairman of the Commission, on several occasions during the proceedings before it, asked counsel for the Price Administrator of the Office of Price Administration, who was the same counsel for the Appellant in the proceedings before the Commission and in this appeal, that he advise the Commission of the aims and purposes of the Office of Price Administration during the period of the national emergency, so that it may learn the attitude of that Office as to the relation of those aims and purposes to the proceeding before the Commission, and to develop testimony along those lines which would assist the Commission in arriving at a determination of those questions.

(k) Further answering the allegations contained in subparagraph c of the paragraph numbered 1 of the Petition of Appeal, the said Appellees aver that the Commission gave

full and complete consideration to such testimony as it was able to obtain relative to the policies and aims of the Federal Government to stabilize the cost of living, and that, because of such considerations and of such findings by the Commission, there were excluded, as elements of cost in determining the rates established by Order No. 2401, Federal income taxes and excess profits taxes in the amount of $164,720.50 in order to prevent the inflationary effect that such allowances would invite; that in establishing the rates authorized by Order No. 2401 the Commission considered 31% as a reasonable rate for Federal income taxes for the test year July 1, 1941, to June 30, 1942, in spite of the fact that the Revenue Act of 1942 under consideration at that time and as finally enacted provided for a rate of 40% for Federal income taxes.

(l) For further answer, the Appellees aver that the Emergency Price Control Act of 1942 (Public Law 421, 77th Congress), approved January 30, 1942, by Section 302 (c) specifically provided that "nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility", and that the Act of October 2, 1942, amending the Emergency Price Control Act, does not authorize the Appellant to regulate, control, or fix utility rates.

(m) The said Appellees further aver that on November 16th, after the expiration of thirty days' notice to Appellant of the increase in rates, the Washington Gas Light Company filed notice with the Commission that effective that date the rates authorized by Order No. 2401 were being put into effect.

5. (a) In answer to the allegations contained in paragraph numbered 2 and subparagraphs a to d, inclusive, thereof, the said Appellees aver that the order of the Commission dated October 23, 1942 (Order No. 2404), is a procedural order reopening the proceedings before the Commission and permitting intervention by the Appellant, and is not an appealable order; that the said order dated October 23, 1942, does not involve the merits of the determinations in the order dated October 13, 1942, which established rates, tolls and charges, and that the said order dated October 23, 1942, is not an appealable order, and the appeal therefrom does not require answer from the said Appellees.

(b) If answer to the said paragraph numbered 2 and the said subparagraphs be required, the said Appellees deny each and every allegation contained in the said numbered paragraph and subparagraphs thereof.

6. For further answer to the unnumbered paragraph beginning on page 4 of the Petition of Appeal, the said Appellees aver that if the purpose of the appeal is as stated in the said paragraph, there is a defect in parties in the said Petition of Appeal in that it is alleged that the purpose is to prevent the Washington Gas Light Company from effecting the schedules of increased rates and charges which have been determined, fixed and ordered by the Commission and to save the Appellant and the consuming public from the increase in the cost of living. The said Appellees aver that in order to accomplish such purpose the Washington Gas Light Company is a necessary party. They further aver that the rates and charges established by the order dated October 13, 1942, were in effect prior to the time this Petition of Appeal was filed.

MOTION TO DISMISS

Comes now the said Appellees by their counsel and move to dismiss the Petition of Appeal upon the following grounds:

1. That the said Petition of Appeal fails to state grounds upon which relief may be granted.

2. That the Director of Economic Stabilization is not affected by the provisions of Order No. 2401.

3. That the Appellant herein had no legal right to intervene in the proceedings before the Commission and the Commission, having granted the intervention, may control the same.

WHEREFORE, the said Appellees, having fully answered the Petition of Appeal and having moved to dismiss the same, pray that the said Petition of Appeal be dismissed.

RICHMOND B. KEECH
General Counsel,
Public Utilities Commission
LLOYD B. HARRISON,
Counsel, Public Utilities Commission
Attorneys for Appellees,
District Building.

Part III

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS BEFORE PUBLIC UTILITIES COMMISSION DESIGNATED BY APPELLEE BYRNES AND BROWN

Chairman HANKIN. Mr. Prettyman, you participated in the proceeding which resulted in the adoption of the sliding scale arrangement, did you not?

Mr. PRETTYMAN. I did, yes, sir. (494)

Chairman HANKIN. As counsel for the Commission?

Mr. PRETTYMAN. Yes, sir, and because of that fact, I might say, if your Honor please, I have asked Mr. Stevens, who was counsel for the company in that proceeding, to be here, because while I feel it proper that I submit the motion to strike the question, nevertheless there would be some embarrassment if the Commission is going to inquire into that question——

Chairman HANKIN. We do not doubt your integrity, Mr. Prettyman. I would like to explain what is meant by this statement on the sliding scale arrangement:

"The Commission early recognized that if any such arrangement was to be of real value it should be sufficiently flexible in its provisions to meet changing conditions in such manner as to avoid injustice to the consumers or the companies and at the same time to permit timely benefits. To endure it must be susceptible of such modifications both as to substance and form as the facts or conditions from time to time may require."

Does not the arrangement itself contemplate by this statement that whenever the facts require a re-examination of items will be made? Now, the fact that I have in mind in (495) this case is this:

The Federal Power Commission some time ago adopted a uniform system of accounts which requires a classification of accounts in accordance with the actual legitimate cost of the property. Now, let us suppose that from a study made under the uniform system of accounts and classification of accounts that it became evident that the value of the properties of the company was $1,055,000 in excess of the original cost; does that not present a sufficient basis for going into the question of inflation of value and should that not be re-examined at this time?

Mr. PRETTYMAN. Your Honor understands that the basis for the rate base in the sliding scale order was perfectly well

known at the time the sliding scale order was adopted in 1935. The company thoroughly understood, and so did the Commission, and so did Peoples Counsel, who was a prime mover in the sliding scale arrangement, that the rate base as then set up was based upon original cost except as to land, and that there was an actual finding of value of the land by the Commission, which value was below the appraised value submitted both by the Commission expert and by the company expert. In other words, that was perfectly well known at the time, and as (496) I recall was fully explained in Mr. Roberts' memorandum in regard to the sliding scale at the time it was adopted. In other words, this question did not develop when the original cost statement was filed with the Federal Power Commission, but was known all of the time——

Chairman HANKIN. That might well be, that our predecessors knew about it, which, of course, does not mean that we should know about it. My own knowledge came through the fact I became interested in the reclassification——

Mr. PRETTYMAN. I do not raise any question as to the rights of the Commission in a proceeding brought for the purpose and with full notice and with full opportunity to prepare evidence, to raise a question as to one of the elements in the sliding scale arrangement. In other words, the question would be should the rate base be limited to original cost, which, of course, would automatically raise the question as to whether the testimony in proof of the rate base not be limited to original cost. That is a separate question from the one——

Chairman HANKIN. You are asking us for an increase in rates under the sliding scale arrangement.

Mr. PRETTYMAN. No. The sliding scale arrangement itself works automatically. We have an agreement with the Commission (497) and we simply come in, together with the Commission's staff, and say the figures under the sliding scale arrangement which has been established by the Commission results in so and so; that is all there is to it.

Chairman HANKIN. You say that under the sliding scale arrangement you are now entitled to an increase in rates?

Mr. PRETTYMAN. No; I say the sliding scale arrangement results in an increase in rates for the next year.

Chairman HANKIN. It would result in an increase in rates if we conceded all of your evidence, but I take it there may well be some question.

Mr. PRETTYMAN. Surely.

Chairman HANKIN. Now, you say that because the Commission started the sliding scale arrangement with a certain item, that thereafter the consideration of that item should be left for a different proceeding?

Mr. PRETTYMAN. Yes; and with adequate notice.

Chairman HANKIN. But that does not seem to be in accordance with the arrangement itself when we consider the statement which I just read to you.

Mr. PRETTYMAN. The statement itself—I do not have in mind what section it is in—but the flexibility in the (498) sliding scale arrangement is specifically provided in Section 6, adjustments——

Chairman HANKIN. No; this is on page 2. This is aside from any particular item.

Mr. PRETTYMAN. I must confess, if your Honor please, I do not see any very serious doubt about the meaning of that section. The sliding scale arrangement is flexible. It has Section 6 which provides for changes as conditions change; furthermore it is flexible in that as costs go up or down, the resulting benefits by way of decrease in rate, or contrariwise an increase in rate, automatically results every year. The sliding scale arrangement in and of itself is a flexible provision and there is not any question at all but that the sliding scale arrangement is susceptible of modification in the basic arrangement. But the point I make is when this Commission issues an order saying you are going to determine the rates and charges pursuant to the sliding scale arrangement, which is the same form of order the Commission has issued every year since the sliding scale was inaugurated, that it cannot under the issues presented by that order proceed to examine into one of the basic elements in the sliding scale arrangement itself. That is an entirely different (499) proposition.

Chairman HANKIN. Has this Commission ever changed the rate of return under the sliding scale arrangement?

Mr. PRETTYMAN. Not in respect to the Gas Company.

Chairman HANKIN. How about in respect to the Electric Company?

Mr. PRETTYMAN. It did.

Chairman HANKIN. Was that made the subject of a separate proceeding?

Mr. PRETTYMAN. Well, I don't know how it came up, whether there was notice the rate of return was going to be considered or not. I am sure I do not know.

Chairman HANKIN. Was this not put in because of that change which was made in the Potomac Electric Rate case under the sliding-scale plan and the question as to the propriety of that change was taken to the courts?

Mr. PRETTYMAN. I think the propriety of the change was taken to the courts. I forget whether that was before or after this sliding scale——

Chairman HANKIN. If the Commission can change the rate of return in considering the rates applicable under the sliding-scale arrangement, why shall it not look into items constituting (500) the rate base?

Mr. PRETTYMAN. I do not say you cannot. You can if the order so provides and notice is given. I do not know what form of order or what form of notice the Commission gave Pepco when they proposed to reduce the rate of return, but I have no doubt the order said that at the hearing they would examine into the rate of return, just as the Commission last March—the notice for this hearing was issued last March—it could have said in the order that you were going to examine into the rate base, but the Commission did not say that. It said they were going to determine rates and charges pursuant to the sliding-scale arrangement.

Chairman HANKIN. In other words, it just comes down to what you said on Friday; it did not give you sufficient time for preparation.

Mr. PRETTYMAN. It makes a much greater difference than that. We think the Commission should go ahead with this proceeding to determine the rates and charges under the slid-

ing scale arrangement and then if the Commission wants to set down a re-examination of the sliding scale arrangement, let it order another hearing, and in the meantime not leave the company hanging as it is, faced with the problem of financing and (501) operation such as this company is faced with; it would leave us totally without any means of making decisions we have to make. We think this proceeding should go ahead under the sliding scale and the Commission then issue its order and proceed to inquire into the sliding scale itself.

Chairman HANKIN. There are lots of things—we should not remain blind to these items—this particular item, for instance, for which you are asking an increase of about $60,000——

Mr. PRETTYMAN. We are not asking for an increase of $60,000 on account of this item; it has been in from the beginning.

Chairman HANKIN. But assuming this item is improper, by how much would that raise your revenue for next year?

Mr. PRETTYMAN. It would reduce revenue by about $65,000.

Chairman HANKIN. Now, before we ordered the rate payers to pay an additional $65,000 under this sliding scale arrangement, we should examine carefully into it.

Mr. PRETTYMAN. But I think it should be an orderly inquiry premises on an order of the Commission and based on the deliberate decision of the Commission it will be re-examined, but not right in the midst of a sliding scale hearing (502) should the company be told the Commission is going to examine into the sliding scale itself. This Commission can consider no more important question with regard to this company than that particular question, and I would like to see if Mr. Stevens has anything to say in regard to it because I am not entirely familiar with the details of the evidence.

Mr. STEVENS. I do not have but very little to add to what Mr. Prettyman has already said, gentlemen, except to point out to you that the sliding scale arrangement was an agreement between the Commission and the company entered into after long negotiations and hearings, at which some ten or eleven thousand pages of oral testimony were taken. Now, that arrangement was believed at the time by the company and the Commission to solve or at least go a long way towards

solving the problem of keeping regulation close behind the actual experience of the company so that when the customers were entitled to rate reductions, they got them promptly rather than await the usual proceeding of a valuation and rate case which sometimes took three or four years. Conversely, it was assumed that when the customers should pay higher rates, they would pay them promptly under that same principle of the sliding scale. (503)

Now, it does seem to us that without going into these questions that Mr. Hankin has raised, that the sliding scale operates both ways. It was always intended to operate both ways. It was an agreement, and under that agreement the company has proceeded to act and carry on its business for seven years and sell its securities. Now, for the first time under the agreement the customers are to pay higher rates if the agreement is to be lived up to by both parties, and it seems to us, I might say, unfair at this time for the Commission to inquire into the fundamentals of the sliding scale, which it has been quite willing to go along over a period of seven years when there have been rate reductions, and the first time there is a step upward, all of the questions that were agreed to in 1935 and lived under for seven years thereafter, are raised, and I would like to point out to the Commission, with all due respect, the company believes that the sliding scale is a two-way agreement; that there are obligations on both sides, and that the welfare of this company, its financial welfare and its financial problem, are inseparably tied up with that of the rate payers, and we——

Chairman HANKIN. I would like to ask a question on the statement you just made. I agree with you thoroughly that (504) a sliding scale arrangement should work both ways, but I question whether your statement that the question I raised presents an unfair situation has any substance.

Let us suppose that throughout all of these years since 1935, the $1,055,000 had no business at all in the rate base. Then, although the rate payers were given reductions under the sliding scale arrangement, would not the conclusion be that the unfairness lay in the fact that they were not getting sufficient reduction?

Mr. STEVENS. May I answer that——

Chairman HANKIN. And now that we are beginning to examine into these items you say that it would be unfair because the rate payer is going to be relieved from paying rates on an inflated base. Where does the question of fairness lie? (505).

V. A. McELFRESH, called as a witness on behalf of the Commission, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION (558)

* * *

Mr. HARRISON. That brings us, then, to the fifth issue which relates to the excess profits tax, and the facts as to that issue will be found in Paragraph 5 of the stipulation. (576)

You have eliminated from operating taxes $43,928.02 covering excess profits taxes. Do you recognize this item as an operating tax under the classification of accounts?

Mr. MCELFRESH. Yes; I think it must be so classified. The classification is more specific as to income taxes, but it has generally been allowed as an operating tax, and I see no difference in the excess profits tax, as a tax, from the Federal income tax.

Mr. HARRISON. But you have suspended that item in this case at the present time?

Mr. MCELFRESH. Yes; I have.

Mr. HARRISON. I assume, therefore, it is correct to state that you have done so for the purpose of bringing the matter to the attention of the Commisison to determine whether such charges in the test year should be considered in the determination of rates for the next rate year when it appears from the facts stipulated in this case that the company will not be required to pay excess profits taxes for the year 1942?

Mr. MCELFRESH. Yes; that is the purpose of this adjustment. It was thought that the Commission could consider whether this amount should be eliminated in the determination of rates for the ensuing rate year since it appears that the (577) company will not then be subject to such a task.

Mr. HARRISON. What effect would the allowance of excess profits tax have in the determination of rates under the

sliding scale arrangement if the company should be subject to excess profits taxes in the year 1942 and later years?

Mr. McELFRESH. An increased rate based on consideration of excess profits tax would produce more excess profits and larger excess profits taxes in ensuing years, and would result in pyramiding the excess profits tax on the company at the expense of the consumer, without material benefit to the company. (578)

* * *

Mr. PRETTYMAN. That completes our case, your Honor.

Chairman HANKIN. Mr. Booth, you stated you wanted to make a motion.

Mr. PRETTYMAN. May I say in regard to adjournment of the hearing for the purposes of Mr. Booth's cross examination, (750) we want to point out, if your Honor please, that these rates are supposed to go into effect on September 1st, and this order for the hearing was issued last March, and the date for the hearing was set some time ago, and the normal operation of the sliding scale arrangement has been known here for a long time. This hearing takes place every year, and we would certainly oppose any extended recess or extended postponement. We think this case is complete and that the order should go into effect.

Chairman HANKIN. I have also reserved my questions until after counsel have examined the witnesses.

Mr. PRETTYMAN. I understood that you have some more questions. Also we probably will have some other things to present.

Chairman HANKIN. Don't you want us to be prepared with those questions? After all, your books were not ready until this month, were they?

Mr. PRETTYMAN. That is perfectly true, but I am talking about an extended postponement. What you refer to always happens in the sliding scale arrangement.

Chairman HANKIN. The first opportunity the Commissioners had to look at any of the figures was last Thursday. (751)

Mr. BOOTH. The Commission having granted leave to the Office of Price Administration to intervene and to be a party in this proceeding yesterday, I would like to refer to our peti-

tion wherein we ask that the sliding scale arrangement be re-examined in the light of the Government's program to prevent further increase in the cost of living.

Counsel for the company suggests they are opposed to an extended recess. I do not know what he has in mind by an extended recess. He also suggests that in the normal course of the operation of the sliding-scale arrangement the proposed rates would become effective on September 1st. The fact is that the analysis of the company's operations with respect to the so-called test year were not available until yesterday, when the hearings were begun—let me correct myself; they were available at the pre-hearing conference on Friday.

We think we are entitled to a reasonable opportunity to examine the results of the company's operations during the preceding year so that we may be in a position to present our views as to whether or not the sliding scale arrangement, if carried out without granting the increase which the company suggests, would impose any substantial hardship upon the company. (752)

Now it is true that upon the company's own presentation, namely, that they are earning approximately 5 per cent upon this rate base after the allowance of all their operating expenses, all items of taxes, including Federal income tax and excess profits taxes and including a number of items that have been mentioned either by one of the members of the Commission or some of the members of the Commission's staff, I think upon that showing there is a pretty clear indication that there would be no substantial hardship imposed upon the company if the existing rates were to remain and no increase were to be granted by this Commission.

Nevertheless, we would like a reasonable opportunity to review the facts, to review the basic phases of the sliding scale arrangement so that we might be in a position to demonstrate to the Commission on the basis of a more complete record than is available today, that the results of the company's operations during the preceding year will impose no substantial hardship upon the company if the rates remain where they are and there is no increase in rates.

Now, I am not going to ask for an extended delay. The company the other day suggested that they wanted sixty days to go into some of the facts raised by one of the Commissioners. (753) I am merely suggesting the sixty-day period as an illustration and that sixty days in a rate case is not considered an unusual continuance. I would like a minimum of three or four weeks, and it might be that after we have had an opportunity to review the record that has been presented here during the last two days, which I understand includes records in two other cases, that I could shorten the time. But both for purposes of questioning the witnesses that have been presented and for the purpose of presenting affirmative testimony, I am particularly interested in presenting some general economic testimony on the effect of changing economic conditions upon what is a fair and reasonable rate of return today as compared with whether or not 6½ per cent was a fair rate of return when the sliding-scale arrangement was entered into.

So I think we are not asking for an extended period in asking that the case go over for three or four weeks, and I think the company ought willingly agree the rates they are now charging should remain in effect; it is up to the Commission, anyway.

One of the issues in the case is the question as to whether or not the company should be entitled to higher rates (754) to compensate them for higher Federal income taxes. Our office has had some experience with this problem in connection with utility companies and I would like to refer to that. There is a company which filed an application for higher electric rates before one of the state commissions recently, and it appeared the application was predicated upon a desire to be reimbursed for higher Federal income taxes, in substantial part, and by income tax I am referring both to Federal income tax and excess profits tax. The other day, upon reconsideration of its petition, the company withdrew its request.

In another case the company raised telephone rates in practically the entire state, and it appeared that in that case the higher rates were sought to offset, in substantial part, estimated higher Federal income taxes. We met with the company and the company withdrew the increase requested.

I know in this case there is the question the company is raising, namely, what is fair and equitable and whether it is being treated fairly in view of the sliding scale arrangement which has been operating for several years and which they say has resulted in substantial rate reductions over a period of years, and whether or not they cannot properly increase those rates. That appears to be a rather delicate question. (755)

I think the issues which we have raised, namely, the relationship between the war and the Government's program to stabilize cost of living can be said to overshadow that, especially since the Commission has granted us leave to intervene. So I would like a period of three or four weeks.

Mr. PRETTYMAN. In reply to Mr. Booth, Mr. Chairman, neither one of the reasons which he assigns for an extension of three or four weeks has any part in this proceeding. He says he wants an extended period of time to present testimony and to argue as to why the rate of return and the sliding scale arrangement should not be changed. That is not in issue and no evidence in respect to it has been presented, and it would take a long time to prepare for a case involving the rate of return under the sliding-scale arrangement. If we are going into that proceeding the Commission will have to issue a new order and bring a new proceeding and give everybody time to prepare for the case, which would be a long, complicated, and exceedingly serious case. But that is not involved in this proceeding.

The second reason he gives for seeking the extension is that this increase resulting from the sliding scale is in (756) part a provision for increased income taxes. That is not the case here as was the case in the instances to which he referred. He did not name the case, but if it is the case I know about where there was a request for increased rates, in that case the company came in and said "We think our income taxes are going to be increased next year and the year after and the year after, and therefore we want our rates increased." There is no such thing as that in this case.

* * *

Mr. HARRISON. About the question Mr. Booth says he has testimony to present relating to the economic aspects of the case, I certainly see no reason for deferring this case for that

purpose. I do not see why that could not be presented today. (759)

* * * * *

Chairman HANKIN. Mr. Prettyman, you made your answer to the request of Mr. Booth addressed to the Commission for a period of three or four weeks. How much time do you think I ought to have to prepare for an examination on the questions which I raised?

Mr. PRETTYMAN. For your preparation on the questions that have been raised, I think it would take you only a very short period to get ready; I should think it would be a matter of only a few days.

Chairman HANKIN. Considering I have other duties to attend to here, and after all, when I raised these questions, you said you needed sixty days.

Mr. PRETTYMAN. No. I said if we had to try the reasonableness of every item and all of these expenditures, and if we had to try the land question, we would certainly take a minimum of sixty days to get ready. But when those are not involved—the land question is not involved—if the (762) Commission had insisted that we try the reasonableness of every item here, of course we would have had to ask for time.

Chairman HANKIN. You mean you needed sixty days to cover the reasonableness of every item?

Mr. PRETTYMAN. It would probably take sixty days to put them in the record.

Chairman HANKIN. So the sixty days was not intended to try the reasonableness of every item, but to try the questions which I raised.

Mr. PRETTYMAN. I premised that entirely on the question of what the questions were. My statement at the end of the prehearing conference was that when we had a statement of what the questions were and when we knew what was involved, we would then know how much extension we would have to ask for. When the questions were read at the beginning of the case yesterday and the form was finally determined, we went straight ahead with the case.

Might I also suggest that since the cross-examination of the witnesses would relate to questions which the Chairman himself

asked, the questions certainly came as no surprise and therefore the period necessary for further examination along that line would not be extended. (763).

Chairman HANKIN. They were shots in the dark, because the first time I had any opportunity to get at those figures was last Thursday, and I have not had an opportunity yet to look into any of the records.

Mr. PRETTYMAN. I appreciate that, and I am quite content that a few days be given for everyone to cross-examine along the lines of the testimony today. But when Mr. Booth asked for an extension on two grounds that have nothing whatever to do with the case and says he wants to present evidence which has nothing to do with any of the issues in this case, I see no reason for carrying over the sliding scale beyond the first of September, because any economic evidence relating to the fair rate of return would be immaterial to this proceeding.

Chairman HANKIN. What would you think, Mr. Prettyman, if we said to you "Here are a number of questions we want you to be prepared on and we will allow you only four days in which to prepare yourself?"

Mr. PRETTYMAN. If it took me longer than that I would object if the questions went to some issue in this case. If Mr. Booth said he wanted to produce testimony on the issues in the case, then that might be something else.

Chairman HANKIN. Do you think we can fairly try a case (764) and have a full and complete hearing both on behalf of the Company and the public within a few days?

Mr. PRETTYMAN. Yes; absolutely.

Mr. BOOTH. I will say this, if the Commission please, that if I was limited to the narrow conception of the issues which are in this case and which Mr. Prettyman now says are in the case, he should have objected to my intervening petition, because fundamentally it presents issues other than the narrow conception of the issues in the case which he believes are now involved in this proceeding.

Mr. PRETTYMAN. I stated when I consented to the intervention that I did not concede those various paragraphs in the petition. Maybe I made a mistake in consenting. If I had known that the only thing Mr. Booth wanted to do was to raise

an issue not involved in the case, I might have objected. The proposition that an intervening party can come into the middle of a proceeding when the Commission and the Company are fully familiar with all of the figures involved and all of the points and what not, and nevertheless the intervener can ask the case go along long enough for him to familiarize himself with all of the records of the Company, is out of order.

Chairman HANKIN. No; that would have taken more than six (765) months, would it not, Mr. Prettyman?

Mr. PRETTYMAN. I think probably it would have. The Commission's staff is fully familiar with every figure of the Company and has been all during the year, in the first place, and ever since the books were closed. This Commission of course has had monthly reports of the operations of this Company all through the year. (766).

ROBERT C. OWERS, called as a witness on behalf of the Washinton Gas Light Company, having been previously duly sworn, testified further as follows: (779).

CROSS-EXAMINATION

* * *

Vice-Chairman HANKIN. In 1941 when you had to pay excess profits taxes, it means that you were earning a greater amount than you had earned in previous years, despite the fact that you were making excess profits; is that not so?

Mr. OWERS. The thing comes about because the excess profits are calculated before Federal income taxes and the return to the utility is after income taxes.

Vice-Chairman HANKIN. But you were making more than what one might call a reasonable rate?

Mr. OWERS. Not at all. We were making less, because in calculating the income for excess profits purposes it was calculated before income taxes. Income tax is part of our expense.

Vice-Chairman HANKIN. But despite the fact you were allowed as operating expenses—not as operating expenses—you were allowed all of the income taxes that you claim, you not only made 6½ percent, but something in excess of that.

Mr. OWERS. We did; yes.

Vice-Chairman HANKIN. In 1941 the excess profits tax (872) was computed on the basis of the previous years, and still you had to pay a tax. What I am interested in is this: Is a public utility entitled to any excess profits?

Mr. OWERS. I do not think they have any true excess profits. I do not think they can have any.

Vice-Chairman HANKIN. Let us suppose it is found that by accident you have excess profits; is it in accordance with your judgment that a public utility is entitled to any excess profits?

Mr. OWERS. I think they may well be; yes. I do not think the words "excess profits" should be taken in its literal sense. I think a utility is entitled to a fair return.

Vice-Chairman HANKIN. To a fair return and anything in addition?

Mr. OWERS. Oh, yes; that is to say, I think the fair return may be more than a fixed stipulated return.

Vice-Chairman HANKIN. Do you mean that the utility is entitled to a fair return and anything beyond it that it can get; or what is your idea?

Mr. OWERS. I think the answer to that lies in the type of regulation which is practically here and all over the country. (873).

Vice-Chairman HANKIN. That is true. Let us assume a fair return is 6 per cent. Is a utility entitled to anything more than 6 per cent of the amount invested?

Mr. OWERS. Well, perhaps not over a period of time, but momentarily I think there is no objection to it.

Vice-Chairman HANKIN. We are now exploring your ideas on the subject. If it should turn out according to the figures here that you were making an excess of 6 per cent and if because of that you made excess profits and excess profits tax is imposed on it, should the rate payer be required to pay not only the tax but also the additional amount—should the rate payer be required to pay the amount which enables you to make the excess profit and also the excess profits tax?

Mr. OWERS. Certainly not, the way things are developing now, a very high excess profits tax; I think it would be absurd to set rates for a utility where substantial sums are taken out, and I would not agree to that. My contention is in a utility

operation, closely regulated, that sort of thing can only be a momentary thing.

Vice Chairman HANKIN. Suppose it is momentary; suppose you make them only one year, should the rate payer be required to pay not only a rate which enables you to make excess profit (874) but also pay excess profit taxes?

Mr. OWERS. Well, that is a rather difficult question to answer. Of course, back in 1941 the situation was not as acute, the tax was not as heavy as proposed for 1942. My theory is that the Treasury is undertaking to get revenues from people and corporations in the country, and the excess profits tax is one means of collecting revenues for the United States Treasury. Under the more liberalized method and under the less drastic rates, I should say there was no particular reason why the excess profits tax should not be treated exactly as any other type of tax, but when you come to a rate as high as that under consideration now, I would agree it is not wise practice to raise rates to a point where excess profits taxes would be incurred.

Chairman FLANAGAN. We will take a five minute recess. [Whereupon a short recess was taken.]

Mr. BOOTH. Mr. Owers, coming back to Mr. McElfresh's statement at page 110 of the transcript, do I understand you agree with it in substance?

Mr. OWERS. Yes; I have no disagreement with it.

Mr. BOOTH. So that if, in fact, the result of this rate increase would be to bring the company within the excess-profits (875) brackets, that you would agree that the sliding-scale arrangement might be set aside and a rate increase waived?

Mr. OWERS. By no means. I would not go that far. I think Mr. McElfresh's statement is to the effect that if you grant rate increases to a point where you cause a company to pay excess profits taxes you have a sort of doubling-up effect. My judgment is that the rate increase which these figures indicate will not produce an excess profits tax. So I see no reason for carrying your statement through to say that the sliding scale should be set aside.

Mr. BOOTH. If in fact your judgment happened to be wrong and the rate increase here would result in the payment of an excess profits tax of 90 percent to the Federal Government and

10 percent to the company, you would say that in that case the increase would be of an inflationary character and therefore might be set aside?

Mr. OWERS. If that was true with respect to the bulk of the increase or with respect to the continuing situation, I should not think if it happened to be a momentary situation where a small insignificant excess profits tax was incurred, it would be set aside.

Vice Chairman HANKIN. I do not quite follow you, Mr. (876) Booth. As I understood Mr. McElfresh's statement, I do not see any conflict between that and the sliding scale plan. The sliding scale plan itself provides that allowance may be made for reasonable accrual of taxes. Now, if for any reason an accrual of a tax is not reasonable it is disallowed by the sliding scale arrangement itself and therefore the excess profits tax, or that part of it as stated by Mr. McElfresh, might be eliminated, and if any other tax is not a reasonable tax for rate-making purposes it may well be eliminated under the sliding scale.

Mr. BOOTH. I agree with that. The position I have taken is whatever are reasonable expenses and reasonable taxes, considering legal principles and the economy conditions, should be allowed. I merely want to know if there was any point at which the company would take the position that the rate increase to which they might be mathematically entitled on their basis, without agreeing that the operation of the sliding scale arrangement might be deferred. As I take it Mr. Owers has said subject to the usual qualifications contained in many of the statements—he says yes, if, but, and so and so. I do not think his statement is one I agree with or is binding on the Commission but I merely want to (877) know if there is any point at which the company would say that even though mathematically year after year under the operation of the sliding scale arrangement we could come in before the Commission and say we are entitled to a rate increase again. It is true the bulk of it or 90 percent is going to Federal income tax and therefore that is not good business; it is inflationary and we are going to waive it. I understand Mr. Owers has said yes, but, and I just wanted his statement for whatever it was worth.

Vice-Chairman HANKIN. Mr. Booth, you do not think any kind of rate-making, whether it be under the sliding scale plan or any other plan, can be resolved into a mathematical formula, do you?

Mr. BOOTH. I think that is the very basis of our petition. The company has taken the position in this case that the rates are determinable purely on their construction of the mathematics of the sliding scale arrangement. We have said we have got to give consideration to current economic conditions and the Government program to maintain the cost of living and stabilize prices. I hope we have made that position pretty clear by this time. (878)

* * *

Mr. BOOTH. What was the total gross revenue of the (897) company for the first seven months of 1942 as compared with the first seven months of 1941?

Mr. OWERS. I will have to get the figures from one of my associates. Off the record.

(Discussion off the record.)

Mr. OWERS. Do you want operating revenues, Mr. Booth?

Mr. BOOTH. Yes.

Mr. OWERS. For the seven months, it was $6,721,797.

Mr. BOOTH. What was it for the first seven months of last year?

Mr. OWERS. $6,017,637.

Mr. BOOTH. What was the percentage increase?

Mr. PRETTYMAN. You are talking about gross revenue or net?

Mr. BOOTH. Will you ask the Reporter?

Mr. PRETTYMAN. Do all of these questions relate to gross revenue, Mr. Reporter?

The REPORTER. Yes.

Mr. OWERS. Approximately 11.8 per cent.

Mr. BOOTH. Off the record.

(Discussion off the record.)

Mr. BOOTH. Would you read into the record now, Mr. Owers—(898) this is your annual report to stockholders for 1941, a printed copy?

Mr. OWERS. It is.

Mr. BOOTH. Will you read into the record page 3 under the caption "gas sales affected by mild winter"?

Mr. OWERS. Yes.

"The total amount of gas sold increased more than four percent over 1940, although there was a decrease in the use of gas for house heating due to unseasonably warm weather during the winter months. Variations from normal temperatures have a decided effect upon the use of gas not only for house heating but to a lesser degree for water heating and other domestic purposes.

"In 1940 for the months in which house heating is required, January through April and October through December, the average temperature in Washington was 42.9 degrees and the sales of gas for heating and domestic purposes during those months averaged 49.5 thousand cubic feet per customer. In 1941 the average temperature during the heating season was 46.5 degrees and the sales of gas averaged only 46.7 thousand cubic feet per customer. Although some factors other than the temperature variation may have contributed to the diminished use of gas by the average consumer, there is no doubt that if 1941 had (899) been colder, say at the normal average of 45 degrees during the months in which house heating is required, the gas sales and the earnings of the company would have been larger." (900)

Mr. OWERS. The Chairman has asked if the company would consider some arrangement whereby if a rate increase is granted, the consumers would be protected against increases in rates resulting in liability on the part of the company for excess profits taxes as a result of such rate increases. The company's feeling about the excess profits tax situation is as I tried to express last Friday; we do not feel it is a practical matter to increase rates and put 90 percent of the increase into taxes. Just how an arrangement of this sort could be worked out we do not know, but the company will be glad to endeavor to work out, perhaps with the Commission's staff, some such arrangement.

Of course, the tax law is in process of change and we do not know what the tax law is going to say. We presumably will, before the end of the year, and the company would be entirely

willing to endeavor to work out a plan whereby any part of any increase that may be granted, which in the (948) development of business through the year would appear to result in an excess profits tax, if that should come about. As I say, Mr. Chairman, as to how this might be done would take a little figuring; whether it could be done by some plan of perhaps refund or something of that sort to the customers in the latter part of the year on the basis of liability in the latter part of the year, I do not know. We are getting into a matter of law which we would want to look into and it would take time to develop, but as to the principle, the company would have no objection to it whatever. It would be in conformity with the company's idea of its position in an excess profits tax situation at these high rates. (949)

* * *

Commissioner HANKIN. I would like to state for the record that I am not even in as fortunate a position as Mr. Booth, because I do not understand the Chairman's question, nor do I understand the witness' answer. Apparently, the question is in the form of a proposal which would be without the scope of the sliding scale arrangement. How the Commission can insist that every item of rate base, income and (950) expense, must be within the sliding scale arrangement and at the same time make this sort of a proposition, I cannot understand, unless it would mean that with reference to some things we may digress from the sliding scale arrangement and with reference to other things we may not. I am more concerned in this proceeding with how the application of the sliding scale arrangement in the light of the facts presented to us by the OPA—the sliding scale arrangement in no sense states that all taxes accrued or paid by the Washington Gas Light Company must enter into the rates. The sliding scale arrangement expressly states that only such taxes should be allowed as would constitute a reasonable amount. Now, what constitutes a reasonable amount, of course, depends upon the facts pertaining to the time when those taxes are being paid, and it was brought out in the testimony last Friday that a normal tax within the experience of the company during the sliding scale arrangement was in the neighborhood of 19 to 20 per cent; that in-

creased taxes beginning with 1940 were in the nature of war taxes, and a question is presented to the Commission whether it would be reasonable to allow the company an exemption from war taxes, as if to say that the company should not bear its share of the burden of this war. (951) but that the burden should be shifted to the consumers.

Now, in computing the taxes for 1941 on a normal tax basis, we find that the taxes would not have been, as brought out, in the testimony, some $526,000, but some $306,000, and on that basis it is pertinent for the Commission to consider within the sliding-scale arrangement whether the difference of over $200,000 should go into the computation of the rates for the next year, that, of course, aside from all other questions that have been raisetl, whether it is reasonable under any circumstances to allow the company an excess profits tax, absolving the company from excess profits, when in accordance with proper utility regulation, a utility is not entitled to any excess profits altogether.

Now, the proposition made is this, as I understand it, or perhaps I did not understand it—that a rate increase might be allowed, but some arrangement might be made whereby the excess profits tax attributable to the increase would be either returned to the consumers, or what should be done with it is not specified. It seems to me that is entirely outside of the scope of this proceeding. I would like to add that the figures I cited are subject to verification. Perhaps I do not recall accurately what the figures were as (952) brought out in the record last Friday. (953)

* * *

Mr. PRETTYMAN. "The first question Mr. Booth mentioned was whether or not the sliding scale has worked a hardship on the Company. There is no such issue in this case. No one claims it has. The question whether it did or did not does not seem to be material in any event. No one is contesting the point." (954)

* * *

Chairman FLANAGAN. Then I say there are other conditions which must be taken into consideration, such as those you have outlined, and I have requested the OPA to give the Commission the benefit of its wisdom and investigation along this line.

Mr. BOOTH. Paragraphs 11, 12, and 13 state "Approval of increase in public utility rates because of increased Federal income taxes would be contrary to the intention of Congress, inflationary in character and adversely affect the program and policy of the Office of Price Administration to stabilize prices.

Chairman FLANAGAN. On that one point, as I remember it in the record, I have at least twice requested that you address yourself specifically to that question.

Mr. BOOTH. We propose to do so. I just want it clear, Mr. Chairman, that is now one of the issues in this case. That was Paragraph 11. Paragraph 12 states, "It appears that this is the first time since the United States entered the war the Commission is called upon to make a determination or fix rates under said sliding scale arrangement. The application of the arrangement should be reconsidered in the light (1043) of the Government's program to prevent inflation and stabilize the cost of living."

Chairman FLANAGAN. What is there in that statement which alters my position that the duty of the Commission first is to determine whether this company is entitled to a rate increase or not, and then to take into consideration, before granting any increase, all of these other matters which are before us.

Mr. BOOTH. That is all I want to know, Mr. Chairman, that paragraphs 11, 12 and 13 are issues in this case as a result of the granting of our petition for intervention.

Mr. PRETTYMAN. I do not agree to that.

Mr. BOOTH. If Mr. Prettyman and Mr. Stevens here are right, and, of course, they are wrong and we all know it—I take it from what you have said and in view of the Commission's earlier ruling, that paragraphs 11, 12, and 13 are in fact issues in this proceeding.

Mr. PRETTYMAN: We do not agree to that. Take Paragraph 12. It states that the application of the arrangement should be reconsidered. That means that the continued use of the sliding scale, as I understand that, no longer should be considered. That is not an issue in the case and was not made (1044) an issue in the case by that representation, since there is no request that it be made an issue.

Here is where Mr. Booth differs with us in regard to that point: The sliding scale agreement is in effect now. Under the statute the Commission, of course, retains jurisdiction. There are two methods by which the sliding scale arrangement can be modified or changed, and only two methods. The first method is that the Commission serve notice that they intend to proceed to consider a modification of the sliding scale. That is a perfectly plain issue. Subsequent to that hearing, if the Commission should call such a hearing, the Commission might decide to abrogate the sliding scale. In accordance with the sliding scale agreement it would then give 90 days notice and would have to give 90 days notice of any such intention on the part of the Commission. The only other way it can be modified, changed or suspended is by agreement. The sliding scale arrangement is an agreement between the Commission and the company and a modification can occur by agreement.

Those are the only two ways in which an issue as to whether the application of the sliding scale arrangement should be reconsidered can be raised. Then, if the Commission (1045) sets a hearing and gives 90 days notice under which it would propose to either modify or abrogate the sliding scale, that is the first way, and secondly it can be done by agreement between the Commission and the company. Such an agreement would be changed at any time by agreement of the parties. There is no such situation presented at the present time.

Commissioner HANKIN. In other words, Mr. Prettyman, according to your view, the question of increased taxes can play no part in this hearing held under the sliding scale arrangement; is that correct?

Mr. PRETTYMAN. Well, it depends altogether upon how broad you are making the question. If there was an increase in taxes last year, then these taxes are deductible under the sliding-scale arrangement——

Commissioner HANKIN. That is just it. The position OPA has set forth in its petition for intervention and which has also been indicated by various questions asked, is that in the past few years there have been abnormal taxes imposed, and they, of course, raise the question of the amount of taxes

which should go into the computation of the rates under the sliding-scale arrangement. The position of the OPA (1046) is these abnormal taxes should not be included. So your position is that you would expand the issues and go beyond the sliding-scale arrangement. Is that correct?

Mr. PRETTYMAN. Certainly.

Commissioner HANKIN. Yes. I do not quite understand what the position of the Chairman is on this matter.

Mr. PRETTYMAN. The Chairman asked the question yesterday as to whether or not the company would attempt to work out——

Commissioner HANKIN. I mean on this matter of intervention. Is it the position of the Chairman that this question pertaining to taxes does enter into the application of the sliding-scale arrangement?

Chairman FLANAGAN. I think I have made myself clear in dividing this proceeding into two parts. So far as the sliding-scale arrangement is concerned, the Commission has the duty to figure out, first, whether this company is entitled to a rate increase strictly in accordance with the terms of the sliding-scale arrangement. As to the second part, I have invited Mr. Booth to give us the benefit of his views and the views of OPA with respect to income taxes and with respect to their contention that income taxes should be treated on the (1047) basis of the so-called normal year rather than an abnormal year. To me, that does not affect in the slightest the application of the sliding-scale arrangement. It is a point in which this Commission is interested and on which we would be glad to hear the OPA.

Commissioner HANKIN. On this particular issue I might say I do not see in it an expansion of the sliding scale arrangement because the sliding-scale arrangement itself provides for only a reasonable allowance for taxes.

* * *

V. A. MCELFRESH was recalled as a witness, and having been previously duly (1213) sworn testified further as follows: (1214).

* * *

Mr. BOOTH. Just one other question. Mr. McElfresh, I talked to you briefly over the telephone about the application of depreciation under the sliding scale arrangement.

Mr. MCELFRESH. Yes.

Mr. BOOTH. I think you said that the accrued depreciation, and I think you now say in the record that the accrued depreciation was taken care of by use of the 4 percent. Do you (1224) recall whether you indicated that a truer or more correct consideration of accrued depreciation would be done if the same rate was used for both interest and the rate of return?

Mr. MCELFRESH. Yes. If you were to apply an interest rate of 6½ per cent to the reserve balance, the net result would be exactly the same as if you had deducted accrued depreciation from the rate base.

Mr. BOOTH. If you had used 6½ per cent the result would be to deduct the depreciation reserve from the rate base?

Mr. MCELFRESH. That is right.

Mr. BOOTH. And that would be a more correct consideration of accrued depreciation than is now given to the subject by the use of the 4 per cent?

Mr. PRETTYMAN. I object to that question.

Mr. STEVENS. I object to that.

Mr. PRETTYMAN. Do you mean more correct under the sliding scale or more correct something else?

Mr. BOOTH. More correct as to the consumers; let me put it that way.

Mr. PRETTYMAN. That is a general question and I do not know how he can answer that question.

Commissioner HANKIN. Let me ask you this question, Mr. (1225) Booth: Do you mean by that, does not this method amount to allowing the company a 2½ percent return on property which is no longer in existence; is that what you mean?

Mr. BOOTH. That is one thing. I think Mr. McElfresh understands it, and I think he can explain it, and I think it is relevant in this case, because we are considering the broad question of hardship. That is the basis for the OPA's position. If the company is getting the benefit, of course, of an improper or inadequate deduction of accrued depreciation——

Chairman FLANAGAN. Are you not getting into the realm which I have indicated was beyond the scope of this hearing, Mr. Booth?

Mr. BOOTH. I do not think so.

Mr. PRETTYMAN. That is the point I have in mind, Mr. Chairman, how the retirement reserve should be computed and the rate of interest which shall be deducted, etc.; those figures are integral basic parts of the sliding-scale arrangement. If Mr. Booth wants to raise the question as to whether the sliding scale ought to be abrogated and some other method of accounting adopted that is to say, we go into the field of depreciation instead of retirement accrual account as provided in the sliding scale, that comes up in some other (1226) hearing where that issue is raised, but it is not an issue in this case.

Mr. HARRISON. The question raised by Mr. Booth is a complete departure from the sliding-scale plan. Mr. McElfresh when he first came on the stand and presented the exhibit No. 1, stated it was prepared in accordance with the sliding-scale plan.

Chairman FLANAGAN. The objection to the question is sustained.

Mr. BOOTH. I understood, but perhaps I misunderstood, that OPA would be given an opportunity to develop pertinent facts for the purpose of determining whether or not a rate increase was necessary in order to prevent a hardship, and in that connection it certainly is necessary to give consideration to the question whether or not under the methods now used in prescribing the rates, it operates as a hardship to the customers as against a hardship to the company. If the company is getting the benefit of a return predicated upon an undepreciated rate base, of course it is clear that that works very, very much in favor of the company and it imposes an undue, and in my judgment an illegal burden upon the rate payers. (1227)

Chairman FLANAGAN. I think, Mr. Booth, we have made clear exactly what we want from OPA. Unfortunately I do not think you are making any attempt to give us the benefit of what I have requested. That type of testimony is ruled out.

Mr. BOOTH. If the Chairman please, the position of OPA is expressed in its intervening petition. We were allowed to intervene and be made a party to this proceeding——

Chairman FLANAGAN. That is right.

Mr. BOOTH. Has there been a change of mind on the part of the Commission as to whether or not we are now allowed to intervene and be a party to this proceeding?

Chairman FLANAGAN. Not in the least, but we have announced from the bench how and in what respects we want the advice of OPA.

Mr. BOOTH. That is, you are now attempting——

Chairman FLANAGAN. The time you are taking up arguing as to the legal position of OPA might well be better devoted to developing some of the ideas of the OPA which will help us.

Mr. BOOTH. Mr. Chairman, it may be that the question of the legal position of OPA is a very important matter from the viewpoint of OPA in connection with this record and the (1228) protection of its rights in this proceeding——

Commissioner HANKIN. Mr. Booth, may I ask you——

Mr. BOOTH. If we have been misled by the authority granted by the Commission on August 18th permitting us to intervene and whether or not the issues we raised in this proceeding are legal issues in this proceeding, of course that is a thing I have been trying to have cleared up and it has not been cleared up to my satisfaction.

Chairman FLANAGAN. I do not think you have been misled. I think it has been very clearly stated.

Commissioner HANKIN. I cannot understand the significance of your question, Mr. Booth. You are trying to analyze the operation of the provisions with reference to depreciation under the sliding scale arrangement; is that it?

Mr. BOOTH. Correct, in the light of what is the law on the subject today.

Chairman FLANAGAN. Mr. Booth, do you contend that the calculation has not been made in accordance with the terms of the sliding scale arrangement?

Mr. BOOTH. Has the calculation been made in accordance with the terms of the sliding scale arrangement?

Chairman FLANAGAN. Yes. (1229)

Mr. BOOTH. I suppose as a matter of mathematics the calculation may be right; but I do not believe that when Mr. McElfresh makes a calculation that that automatically divests

the Commission of its legal jurisdiction and its legal duty to find rates that are fair and reasonable to the customers as well as the company in the light of what is the law on the subject today.

Chairman FLANAGAN. I think we have discussed that several times and I think the position of the majority of the Commission is as clear as I can give it.

Commissioner HANKIN. What is your ruling?

Chairman FLANAGAN. That question I have ruled out.

Commissioner HANKIN. I would like to dissent from that ruling on this ground: As I take it, neither the OPA nor anybody else raised the question that the excess allowance under the sliding-scale arrangement for depreciation over and above actual depreciation should be eliminated from the computation of the rate under the sliding scale arrangement. In other words, as has been partly brought out by the testimony, the company is given a return of a 6½ per cent on its rate base, undepreciated rate base. The deduction under the sliding scale arrangement in effect is 4 per cent of the reserve for depreciation (1230); is that correct?

MR. MCELFRESH. Yes.

Commissioner HANKIN. In other words, under the sliding-scale arrangement, what this actually amounts to is that in addition to being allowed 6½ per cent on the actual rate base, the company is allowed 2½ per cent on property which no longer exists, which is depreciated, or on the depreciated part of the rate base.

Now, we need not at this time consider whether the allowance for return should eliminate this 2½ percent, but it certainly becomes a very pertinent question in this case when the company itself states that it is in a desperate position, that it would be unfair, and so forth and so forth and so forth, to consider whether the company should be disallowed an increase upon the computation that is already made. It seems to me that the entire question of fairness that has been raised by the company has no bearing in the case where in addition to being allowed 6½ per cent return on its actual rate base it is allowed 2½ per cent on property which no longer exists.

Chairman FLANAGAN. Of course, if the Commissioner insists

on getting into the record views which the majority rules out, we cannot stop it except by instruction to strike, and in this (1231) case I will not do so. * * *

* * *

Commissioner HANKIN. It certainly is not appropriate when it goes to the question that is raised necessarily in this case. I have raised this question on a previous occasion in another hearing pertaining to another utility.

Chairman FLANAGAN. Will you proceed, Mr. Booth?

Mr. BOOTH. Mr. McElfresh, you indicated earlier in your testimony that the operation of the 4 per cent is intended to provide for accrued depreciation. You do not by that statement mean to imply that it correctly takes care of accrued depreciation in this property in the determination of rates except that it apply—the 4 per cent is merely the proper mathematical calculation under the sliding scale arrangement?

Mr. STEVENS. I object to the question.

Mr. BOOTH. I suggest that I be permitted to go on with the questioning, Mr. Chairman.

Mr. STEVENS. That kind of question leads to the inference (1232) that Mr. McElfresh, if he says yes, disapproved this arrangement.

Mr. BOOTH. He told me he did not believe it correctly applies for accrued depreciation.

Mr. STEVENS. I object.

Chairman FLANAGAN. The objection is sustained. If the questions are confined to the proper calculation made under the sliding-scale arrangement which has been in effect for years, then there is no reason to object to it.

Mr. BOOTH. Mr. Chairman, the reason was explained for the 4 per cent, that it takes care of accrued depreciation. I do not know whether it was intended to give the company a bonus by failure to deduct accrued depreciation, but I do not think it is fair to have the witness leave the record in the state of having it appear that the 4 per cent interest properly and adequately takes care of accrued depreciation, and that is the inference which is to be drawn from the status of the record at this time—just a moment, Mr. Stevens.

Mr. STEVENS. I am just getting up.

Mr. BOOTH. I have discussed this matter with Mr. McElfresh off the record in order to explain it, and as I (1233) recall he stated that a more accurate or an accurate determination of the accrued depreciation would be to have applied an interest rate of 6½ per cent. I think that is what he indicated. Now, I may be wrong about it, but I think it would be most unfortunate to have the record show that the witness stated that the 4 percent takes care of accrued depreciation.

Chairman FLANAGAN. I do not think the witness has made any such statement. He has testified to his calculation under the sliding-scale arrangement.

Mr. STEVENS. I suggest it is obviously improper after the Chairman has ruled on a motion that counsel for any party go on and explain why the Chairman is wrong or why he thinks he is wrong. I ask that the statement of Mr. Booth be stricken from the record.

Mr. BOOTH. I strenuously except to Mr. Stevens' remarks, and I do not think Mr. Stevens ought to continue to imply that I ought to try this case according to the method which Mr. Stevens thinks will develop the best record in order to help his company get a rate increase. That is not my theory of trying a rate case.

Chairman FLANAGAN. Let us proceed. (1234)

Mr. BOOTH. I understand that the Chairman has ruled out further questioning of this witness in connection with the determination of annual and accrued depreciation under the sliding scale?

Chairman FLANAGAN. Your understanding is not correct, Mr. Booth. So long as the questions pertain to Mr. McElfresh's activities as chief accountant under the sliding-scale arrangement, your questions may be perfectly proper.

Mr. BOOTH. Mr. McElfresh, as I understand it, the sole function which you performed in the preparation of this exhibit with respect to depreciation was to make a mathematical calculation?

Mr. MCELFRESH. Depreciation in a sliding-scale rate case is determined in accordance with the provisions of——

Mr. BOOTH. That is all you did?

Mr. MCELFRESH. Yes; that is all I did.

Mr. BOOTH. You are not saying it is correct?

Mr. MCELFRESH. I am saying it is correct in accordance with the sliding-scale agreement.

Mr. BOOTH. But you are not saying that the application of it is fair and equitable?

Mr. STEVENS. I object. (1235)

Chairman FLANAGAN. Mr. Booth, why do you continue that line of questioning to attempt to get into the record some opinion which you know has no relevance to the sliding scale? When this Commission decides to open the case on the sliding-scale arrangement it will give appropriate notice and conduct that investigation as a separate problem.

Mr. BOOTH. Will it indicate whether it has any intention of doing so?

Chairman FLANAGAN. It will not indicate one way or the other at this time.

Mr. BOOTH. That is all at this time. (1236)

* * *

(1276) LETTER TO HON. GEORGE W. NORRIS FROM LEON HENDERSON

Honorable GEORGE W. NORRIS,
United States Senate,
Washington.

DEAR SENATOR NORRIS: I was greatly interested in your letter of August 11 on the problem of utility rates and the program of this office and the National Government to stabilize commodity prices and the cost of living. The problem has been given special attention by this office in recent weeks and I shall be happy to supply you with information about our activities in that field and "to aid you in ascertaining to what extent applications for such increases are coming in from over the country generally and, if they are coming in, what we are doing about the matter, and what we are able to do to prevent such increases."

As you know, the Emergency Price Control Act exempts utilities and common carriers rates and we are without power to fix such rates and charges. Nevertheless, we have deemed it necessary to participate in rate regulatory proceedings in

our effort, not altogether unsuccessful thus far, to prevent increases in conflict with our basic program.

Let me refer briefly to some of the specific cases and problems we have recently encountered in this field. In April our attention was called to the 15% increase in telephone rates made by the Northwestern Bell Telephone Company in the State of Ohio. This increase, termed a surcharge by the company, was imposed on nearly all exchange and intrastate toll service. No regulatory agency whose permission must be first obtained for such rate increase in Iowa is provided for by the laws of that state. After obtaining the technical assistance of the Federal Communications Commission, we called the company in conference and requested it to withdraw this increase, as it appeared that the higher rates were imposed in large part to offset estimated higher Federal income taxes. The company agreed to this request and subsequently withdrew a request for a rate increase of about the same character pending before the North Dakota Commission, although it had earlier obtained the approval of the South Dakota Commission for a similar increase in rates.

We are attempting to keep a close watch over other telephone rate increase applications in various parts of the country. The American Telephone and Telegraph Company has furnished us with a list of all such applications which have been made by its associated companies. I am glad to say that there are now relatively few such applications pending.

A somewhat more difficult problem with respect to telephone rates is presented in connection with the rates charged by the independent telephone companies because of their large number. We recently met with the Executive Committee of the United States Independent Telephone Association and explained our program to them. To the extent of our ability, we propose to scrutinize their requests for increases and participate in as many cases as possible.

Because of your lifelong effort to protect the public in their relations with the electric light and power industry, you may be especially interested in our work in the electric rate field. It is true, as you suggest, we filed a petition for intervention in the Bangor Hydro-Electric rate case before the Maine Public

Utility Commission. There, too, it appeared that the increase requested was because of projected higher Federal income taxes. Moreover, we were advised by certain paper companies, customers of the electric company, that if the power rate increase was approved, they would seek to have our maximum prices on paper and pulp increased. While conferences were pending with respect to the date of hearing, the company withdrew its application for an increase.

At the request of the Rural Electrification Administration, we participated in conferences with respect to a proposed increase in rates for electric energy sold by an electric company to a rural cooperative. Subsequently, the company withdrew its request for higher rates.

Among other power rate cases now receiving our attention is The Niagara Falls Power Company case before the New York Public Service Commission. In another, the Pennsylvania Power and Light Company is seeking increases before the Pennsylvania Public Utilities Commission applicable to its commercial and industrial customers. We will probably seek to intervene in this case also.

Our survey of pending electric rate cases does not now indicate a large number of applications for rate increases. However, there is now an upward trend in the number of requests for rate increases before the state commissions, which seems to be due primarily to efforts to shift war taxes upon the utilities to their consumers.

The gas rate problem appears to be more troublesome at this time. Among the cities where increases have recently been made or now pending are Boston, Philadelphia, Cleveland, Minneapolis, and Washington, D. C. We are now or will oppose most of these increases, particularly because they adversely affect the cost of living of practically the entire populations of those cities.

The relationship of taxes to utility rates is extremely important in devising and administering a proper program to control prices and the cost of living. In peacetime the principle that a utility is entitled to a fair return after allowance of all Federal income tax has been generally accepted. As an essential war measure, however, we propose to oppose the applica-

tion of this principle to any request which would contemplate an increase in rates predicated upon the allowance of anything over and above the normal Federal income tax. Higher rates predicated upon increased Federal taxes would obviously be contrary to the intention of Congress, be inflationary in character, and adversely affect our program to prevent further increases in the cost of living.

In our work in this field we have sought to cooperate with the existing regulatory agencies. Both the Federal Power and the Communications Commissions have gladly made available the advice and help of their technical experts.

I am glad to state that our right to intervene and participate seems to be readily conceded in these cases before the Federal and State utility commissions. However, one Commission, that in the State of Illinois, has not yet acted upon our request for intervention. This is a proceeding involving streetcar fares in the City of Chicago. Of course, we have no desire to interfere with the efforts of the State or Federal Commissions under their respective statutes to reduce rates whenever found necessary.

In seeking to cooperate with the existing regulatory agencies in the utility and railroad rate fields, we are proceeding in the belief that when Congress exempted these rates from our jurisdiction it was implied that these Commissions would recognize that the dominant principle governing the fixing of all prices in wartime would be the Government's program to stabilize commodity prices and the cost of living and that the utility and railroad rate principles must be reexamined in the light of the Government's economic program, the success of which depends both the winning of the war and the peace. Their recognition of this obligation will be an important step in the success of the Government's program to prevent further increases in the cost of living.

Therefore, while I hope that there will be no need for additional legislation in this field, serious consideration must be given to the practice in Canada where the consent of the Price Board, which administers an over-all program, as well as that of the existing regulatory authorities is a prerequisite to utility rate increases. Certainly, it should be understood without ad-

ditional legislation that Federal income taxes shall be borne by those upon whom such taxes should be levied. A different policy would seriously impair, if not destroy, the basic efforts of the Government to stop inflation.

We appreciate very much your interest in this phase of our work. If we can furnish you with any additional data or information on it, please do not hesitate to call upon us.

Sincerely yours,

LEON HENDERSON,
Administrator.

* * *

Mr. BOOTH. I move the admission of Exhibits 6 and 8.

Mr. STEVENS. I object to the admission of the paper which has been marked for identification as Exhibit 8 on the (1309) ground that the figures with respect to depreciation are erroneous and that the result must of necessity fall with any infirmity of the elements from which the result is derived. I also object to this document on the ground that the Federal income taxes computed by this witness are entirely outside of the formula stipulated in the sliding scale, and again the result of this paper would be incorrect as being based on an infirm foundation.

Mr. BOOTH. I say that under Section 18 of the Public Utilities Act and other provisions of the Public Utilities Act, the Commission is under legal duty to receive this exhibit in its entirety, and what we have done is to prepare an exhibit here predicated upon the lawful way of treating both depreciation and income taxes for the purposes of determining fair and reasonable rates. We have made no adjustments in other operating costs other than those made by the Commission's accountants which have been accepted, but we have asked the Commission to throw the case wide open so that the Commission may be in a position to consider all relevant factors determining the right of the company to a rate increase so that we can follow the Public Utilities Act under which it operates in fixing rates. (1310)

I take it that the Commission has indicated that it proposes to take that motion of mine which I made earlier today under advisement. It might very well be helpful to the Com-

mission in the consideration of the motions which I made to have before it this exhibit in evidence.

Chairman FLANAGAN. Exhibit No. 6 is admitted. Exhibit No. 8 is in direct variance with the calculation called for under the sliding-scale arrangement. The method of calculating depreciation is no more correct than a calculation under the direct method would be. For those reasons Exhibit No. 8 is not admitted.

(The exhibit referred to was received in evidence as Exhibit No. 6.)

Mr. BOOTH. Do I understand the Commission has also ruled it will not receive this exhibit with respect to our determination of income taxes for the purposes of this proceeding—by excluding this exhibit?

Chairman FLANAGAN. The exhibit is excluded in its entirety. (1311)

* * *

Commissioner HANKIN. I think the Chairman correctly stated that is the ruling of the majority of the Commission. I cannot agree with the ruling excluding Exhibit 8 from the testimony. The Commission in effect says to the OPA, "You can hang your clothes on a hickory limb, but don't go near the water; you may present evidence concerning the effect of increased taxes, of wartime conditions, and so forth, but do not put that down in the form of an exhibit which would show that the company is entitled to a decrease in rates rather than an increase in rates"; I cannot agree with that sort of ruling. (1319).

* * *

Mr. STEVENS. At this time in response to the suggestion of the Chairman and his instructions to the staff of the Commission, the staff of the Commission and the staff of the company have collaborated in preparing a form which is submitted to the Commission herewith, dealing with the excess-profits tax question. That form has been in the hands of Mr. Booth and Mr. Joseph for several days and we would be very glad, the company would be very glad, if there are any questions with respect to it, to have one of the officials of the company answer those questions.

I am sure that the Commission also will be glad to have Mr. McElfresh answer any questions. I have personally thought it is entirely clear and needs no explanation, but that is my own personal opinion, and of course is entitled to no (1337) weight at this time. I would like to offer this paper for the consideration of the Commission, and as I say again, if there are any questions the Commission has or any other counsel have with respect to it we will be glad to put a witness on the stand to answer those questions.

Commissioner HANKIN. I have one question. I do not know what that document is. I have heard numerous references to it. I would like to know why it has been kept secret from one of the Commissioners and not from the others; just what is in it that it is such a secret?

Mr. STEVENS. Nothing at all. You were here at the time the suggestion was made by the Chairman.

Commissioner HANKIN. Yes.

Mr. STEVENS. As far as I know there has been no secrecy or anything like secrecy in the matter and I will clear up any suspicion of secrecy you may have.

Commissioner HANKIN. I wish you would; I don't understand.

Mr. STEVENS. I will do that by handing you a copy of these two paragraphs at this time.

Mr. BOOTH. There are three paragraphs in the copy I have.

Chairman FLANAGAN. Mr. Stevens, as to secrecy, we are (1338) all on an even footing. None of the Commissioners has seen a draft of that document as far as I know. Would you mind having a witness explain simply just what is intended to be accomplished by that document, please?

Mr. STEVENS. The intention, simply, may it please the Commission, is to provide a method by which any increase in rates which may be ordered by this Commission which otherwise would be subject to excess profits taxes may be returned to the customers so that there will be no excess-profits taxes with respect to any increase and that if there otherwise would be a second increase, those payments will be refunded to the customers. I submit that for the consideration of the Commission.

Mr. BOOTH. Do you have someone who could testify on it on the witness stand?

Mr. STEVENS. I would be glad to ask Mr. Ritenour who collaborated with Mr. McElfresh in preparing this tentative suggestion to answer your questions.

Mr. BOOTH. You say it is tentative; when do you expect it to be changed?

Mr. STEVENS. The only body that can change it, as I understand it, will be the Commission; neither you nor I, (1339) Mr. Booth, can supersede the prerogatives of the Commission.

Mr. BOOTH. I do not suggest that.

Mr. STEVENS. We are submitting it to the Commission for its consideration as a possible part of any order that the Commission might make in this case (1340).

* * *

Mr. STEVENS. May I say that one thing I want and that the company wants above all things in this case is to have the Commission be informed as to all of the facts that are pertinent, no matter how slight or minor, in this proceeding, so that it will have all of the necessary information, and with that in mind Mr. Prettyman and I feel that if the Commission would prefer, we would be willing to have exhibit 8 go into the record for whatever weight it may have, the (1340) arguments having been made with respect to it being so clear and the issue being so clear, I believe there cannot be any misconception or misleading of the Commission because that exhibit might be in the record. So if you have no objection, Mr. Harrison or Mr. Booth, we are willing to have the exhibit in, subject, of course to our contentions with respect to its weight and to our statements with respect to the infirmities of certain of the figures used therein.

Mr. HARRISON. I have no objection to its receipt subject to whatever value it may have to the Commission.

Mr. BOOTH. I assume the Commission has ruled on it. Of course, the Commission is free to reconsider its ruling at any time, I believe. If the Commission desires to reconsider its ruling and admit it, that is its privilege and we would like to be advised, of course, if the Commission desires to reconsider its ruling.

Commissioner HANKIN. Mr. Stevens, do you admit that your strenuous objection to that exhibit was erroneous?

Mr. STEVENS. I do not.

Commissioner HANKIN. Then why do you want that exhibit admitted?

Mr. STEVENS. I renew all of my objections to it, but (1341) I do feel, Mr. Hankin, an administrative proceeding is perhaps different from a strictly judicial proceeding, and we do not want to keep from the Commission anything that bears directly on the computation of the sliding scale.

Commissioner HANKIN. Mr. Stevens, do you mean to tell me that that exhibit would not be admissible in court under the rules of civil procedure or under rules of evidence applied in equity cases?

Mr. STEVENS. I do.

Commissioner HANKIN. I beg to differ with you, let alone in an administrative proceeding. That is why I was so amazed such a ruling should have been made on the admissibility of this exhibit.

Chairman FLANAGAN. In view of the statement of counsel for the company and counsel for the Commission, the Commission will reconsider and admit Exhibit 8 in evidence. (1342)

* * * *

Mr. PRETTYMAN. We will be glad to have Mr. Ritenour answer any questions anybody has to ask.

Chairman FLANAGAN. Mr. Ritenour, will you take the stand?

O. H. RITENOUR was recalled as a witness and testified further as follows:

FURTHER CROSS-EXAMINATION

Mr. BOOTH. Since the hour is growing late, Mr. Chairman, I suggest the witness merely hand this paper to the reporter and have it copied in the record, and that will save the time of reading it.

Chairman FLANAGAN. Very well.

(The statement referred to is as follows:) (1359)

"For the purpose of preventing the inflationary effect of increased rates, in the event such increased rates would result in

the payment of excess profits taxes by the Washington Gas Light Company, any portion of the amount derived from the increased rates hereinafter authorized, which, if retained by the Company would be subject to excess-profits tax, shall be recorded in a specially provided deferred credit account. The amount derived from increased rates shall be deemed to be —% of the amount billed for sales of gas subsequent to the effective date of this order. The above stated percent is the ratio of the increase authorized herein to the total sales of gas for the test year ended June 30, 1942, calculated at the rates hereinafter authorized.

The amount recorded in the deferred credit account as of December 31, 1942, and as of December 31st of each year thereafter so long as this order shall remain in effect, shall be returned to the gas customers in the District of Columbia by appropriate deductions from gas bills rendered to such customers as soon after December 31st as practicable. The amount of individual refunds shall be determined by ascertaining, by classes of service, the relation of the amount refundable to the total amount billed during the month of December and (1360) applying such percentage to each customer's December bill. Refunds so determined shall be shown as credits on customers' bills as soon after December 31st as practicable. In the event the amount recorded in the deferred credit account as of December 31st is less than $10,000, such amount shall be treated as operating revenue."

Mr. BOOTH. Are you giving it an exhibit number?

Mr. STEVENS. No; we are offering it at the request of the Chairman.

Mr. BOOTH. You are going to explain it?

Mr. STEVENS. It needs no explanation, unless a person cannot read the language. If you have any questions with respect to it, Mr. Ritenour will be glad to answer them, or if Mr. Harrison has any questions.

Mr. BOOTH. I have a few questions. I will be glad to defer those until someone else asks the witness about it, but I would like to ask a few questions at this time if it is agreeable to the Commission.

Chairman FLANAGAN. You and Mr. Joseph have studied this over the week end and you must have some questions. Don't be so facetious.

Mr. BOOTH. I said I have some. (1361)

Chairman FLANAGAN. Please proceed with them.

Mr. BOOTH. Mr. Ritenour, you participated in the drafting of this statement?

Mr. RITENOUR. I did.

Mr. BOOTH. What do you understand the purpose of it to be?

Mr. RITENOUR. The purpose of the work we did was to prepare an outline of a plan which would protect the gas customers in the District of Columbia against the possibility of excess-profits taxes. The work was done in response to the request of the Commission that the Commission's staff and the company's staff get together and prepare such a plan. (1362)

* * *

Chairman FLANAGAN. The Commission has before it the petition for the reopening of the proceeding filed by the Office of Price Administration. Do you have any statement you wish to make in connection with this petition, Mr. Booth?

Mr. BOOTH. Do I understand the Commission is about to rule on this?

Chairman FLANAGAN. That is right.

Mr. BOOTH. Has it reached a decision on it?

Chairman FLANAGAN. I am asking the questions. Do you want to make a statement with respect to this petition or not?

Mr. BOOTH. I would like to say this, if the Chairman please, that this motion for reopening must be read in the light of the decisions which we have referred to in our brief and in the light of the legal principle that the Commission's function under the law is to fix fair and reasonable rates; that while it may have been possible in 1935 to have complied with its responsibilities and duties under the Public Utilities Act to fix fair and reasonable rates by resorting to a formula entered into in 1935 which may have (1420) been predicated at that time upon the economic conditions and the legal principles which governed the determination of fair and reasonable rates in 1935 and

thereafter as long as there had been no change in the economic conditions, but the Commission cannot now, in 1942, when there has been, as the Commission well knows, such a drastic and complete change in the economic problems and in our economic structure from what they were in 1935, the Commission can no longer fulfill its legal obligations under the Act to fix any reasonable rates without granting the motion which we have filed with this Commission seeking a reopening.

Now, it is true that the Commission did allow the Office of Price Administration to intervene in this proceeding, and we take it that the Commission granted the Office of Price Administration the right to intervene and become a party even though at no time did we have a formal order from the Commission with respect to our own petition for intervention, but I think that the state of the record is such, in view of the many qualifications which the Chairman and majority of the Commission have made with respect to the issues and the legal issues which the company has notice are involved in the proceeding, that the Commission cannot on the basis of the (1421) record before it find that any rates would be fair and reasonable other than the rates which the company now charges and are on file with this Commission.

So it is our position that notwithstanding the fact that there has been some evidence introduced by the Office of Price Administration and some questions asked by the Chairman and by one of the other Commissioners, and miscellaneous evidence introduced on various factual questions in the case, that our position is purely and simply a legal one; that under the Atchison case, to which we have referred and in which the Supreme Court of the United States set aside an order of the Interstate Commerce Commission because that Commission failed to reopen a rate proceeding in view of the changed economic conditions which were brought about as a result of the depression of 1931 and thereafter, so here the Commission would be legally powerless to find any rates that are fair and reasonable rates under the statute without granting the motion which we have filed or entering an order on its own motion of a substantially similar character.

* * *

Mr. STEVENS. I do not think we have anything to say, if it please the Commission. This matter has been argued many times throughout the course of these hearings and the Commission is thoroughly familiar with the principles involved. As Mr. Hankin has pointed out, the reference to the Atchison case as an authority here is an improper one; that is, the Atchison case does not stand on the principle Mr. Booth indicates. It is clear, I think, on this record, that the Commission's hearings have been on the sliding-scale arrangement and it seems to me that anything further that company counsel might say on that subject would be merely adding to what has been said time and time again, not only by the Commission but by counsel throughout this hearing.

If there are any specific questions you would like to ask, we will be very glad to answer them.

Chairman FLANAGAN. I have no questions.

Commissioner HANKIN. Do you say the hearing in this case proceeded entirely upon the sliding scale arrangement?

Mr. STEVENS. Yes.

Commissioner HANKIN. Has it not gotten beyond the (1426) sliding scale arrangement when you witdrew your objection to the admissibility of Exhibit No. 8 presented by OPA?

Mr. STEVENS. I don't recall what Exhibit 8 was, Mr. Hankin.

Commissioner HANKIN. It was a tabulation showing the company was not entitled to any increase but that there were excessive earnings to the amount of something like $45,000.

Mr. STEVENS. Mr. Hankin, I think it was made clear at the time that the reason company counsel did not press their objection to Exhibit 8 was because the exhibit was so patently incorrect on its face that the Commission itself, without further argument by counsel, could determine the obvious impropriety of that exhibit and consequently we felt that in order not further to delay the proceedings we would merely raise the question, which the Commission I am sure is fully aware of, with respect to the weight of the exhibits itself. We had no thought of going outside of the hearings, of course.

Commissioner HANKIN. If the substance of that exhibit was pertinent evidence, what assurance did you have that the Com-

mission, upon considering that evidence, would find it to be erroneous? (1427)

Mr. STEVENS. I think it is erroneous on its face, and we pointed out the errors to the Commission on the record. I think the very reading of the exhibit itself shows that. The Commission has been so advised, not only by counsel for the company but by its own staff.

Commissioner HANKIN. You seem to be very certain of what we might decide.

Mr. STEVENS. I am just thinking you and your associates are experienced members of a regulating commission and that you will consider any element of evidence to have such weight as you in your discretion decide to attribute to it. We pointed out, as I say, its obvious errors. (1428)

* * *

Chairman FLANAGAN. The ruling stands.

Is there any other statement to be made before the Commission announces its ruling with respect to the petition for reopening? If none, the majority of the Commission, the majority meaning General Kutz and I, rule that the petition for reopening the proceeding attached to the letter of the Office of Price Administration dated September 26, 1942, and received in the Office of this Commission on September 28, 1942, is denied.

Mr. BOOTH. May the record show our exception to the Commission's ruling?

Chairman FLANAGAN. Exception may be noted. (1434)

Commissioner HANKIN. I dissent from the ruling of the Commission for the reason that in my judgment no rate hearing can leave out of consideration all pertinent facts which go into the computation of rates. The fact that in this proceeding the Commission is guided by a sliding-scale plan in no way diminishes the Commission's duty to establish just and reasonable rates based on all elements of rate making. To proceed otherwise means to deny a full and fair hearing, either to the company or to the public; in this case it is a denial of a fair and full hearing to the public. (1435)

* * *

Mr. BOOTH. There was one other document that was requested this morning from our office, and that was the letter of the Honorable James F. Byrnes, Director of the Office of Economic Stabilization, dealing specifically with this proceeding. I have a copy which I understand to be an exact copy of the copy which is on file with the secretary of the Office of Price Administrator. (1529)

* * *

Mr. HARRISON. I am reading from the copy handed me by Mr. Booth, which he states is a copy of the original, dated October 15, 1942. The caption is:

"EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF EMERGENCY MANAGEMENT
OFFICE OF ECONOMIC STABILIZATION"

and in the upper left-hand corner, "James F. Byrnes, Director," dated Washington, D. C., October 15, 1942, and the letter reads as follows:

"DEAR LEON. The press of yesterday carried an account of the order of the Public Utility Commission of the District of Columbia entered October 13, 1942, authorizing certain increases in the gas rates to be charged consumers living in the District of Columbia. Prior to the entry of such order there had been enacted the Act of October 2, 1942, which, among other things, provides

"'* * * that no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first (1530) gives thirty days' notice to the President or such agency as he may designate and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase.'

"On October 14, I delegated to you the authority under the terms of the quoted provisions of the Act of October 2, 1942, which was intended so far as possible and within the limitation of fairness to prevent any increases in utility rates affecting the cost of living.

"It came to me as a surprise that such action on gas rates in the District should be taken so soon after the enactment of the

emergency legislation to stabilize the cost of living and the issuance of the President's executive order thereunder, without deliberate consideration of the effects of such action on national policy and the conformity of such action with the letter and the spirit of the law.

"I would suggest that you take such action as is within your power to have the increase stayed and the case reopened for a more adequate consideration of the effect of the increase on the national stabilization program resulting from the enactment of the Act of October 2, and the issuance of the President's executive order of October 3, subsequent to the (1531) hearing on this application and your appearance before the Commission thereon.

"Sincerely yours,

"(S) JAMES F. BYRNES, *Director.*

"Hon. LEON HENDERSON, *Administrator,*
Office of Price Administration." (1532)

* * *

Part IV

EXCERPTS FROM ORAL ARGUMENT BEFORE THE DISTRICT COURT

Mr. BOOTH. "We also presented, among others, three other exhibits, Exhibits 10, 11, and 12, which reveiwed the financial history of the company under the sliding scale arrangement. I would like to hand copies of those exhibits to the Court. They were admitted in evidence. (2568).

* * *

"* * * On that point I want to refer to the record at page 494, to a statement by Mr. Prettyman, following a suggestion of mine to the Commission that that was one of the issues that would be presented if the Commission accorded us the rights that we were entitled to. Mr. Prettyman stated as follows—Mr. Prettyman is counsel for the company and is here, of course:

"'The first question Mr. Booth mentioned was whether or (2599) not the sliding scale has worked a hardship on the company. There is no such issue in this case. No one claims it has. The question whether it did or did not does not seem to be material in any event. No one is contesting the point.'" (2600).

* * *

Mr. KEECH. "Now, counsel for the Office of Price Administration cited a decision or a memorandum opinion of Mr. Chief Justice Alfred A. Wheat in connection with a case that came before this Court in 1930, I believe, wherein the Public Utilities (2677) Commission sought to bring about a modification in the Sliding Scale Plan in effect. It happened to be my pleasure at that time to represent the Commission, and I was able to sustain the view that we took, that where there was proper notice of hearing and where there were adequate facts to warrant the Commission to function in a particular case, there is a continuing, and necessarily a continuing, jurisdiction in the Public Utilities Commission to deal with the subject of rates.

May I repeat that that case and the decision which I asked for at that time was born of a situation totally and entirely different from that before your Honor in these particulars:

First, there was an investigation called, which in terms provided that as an element to be considered. Subsequent to the order of investigation there was a notice of hearing wherein there was specifically set forth a provision that the subject of rate of return was to be considered. That does not appear in this case, and, therefore, in my opinion, it makes a decided difference.

Now, turning to the Gas Case, it would be made to appear that there was no action, considered deliberation, or (2678) determination made by the Public Utilities Commission leading up to the resulting order which is here before Your Honor on appeal. A consideration of that order would be totally inadequate unless this Court had before it, as our answer does place before you, the history leading up to the Sliding Scale Arrangement.

The Commission had under consideration as a condition precedent to the entering into of any Sliding Scale Arrangement, a full engineering and accounting study looking to a determination of valuation as required by our statute and as recognized by the law of the land. There were thousands of pages of testimony taken; there were hundreds of exhibits in that case; there were months of deliberation on that case, resulting in findings of value for the then Washington Gas Light Company and the Georgetown Gas Light Company.

And may I interject at this point, sir, that there were specific findings with reference to all of the material elements entering into a valuation.

I should say to you that in those valuations, contrary to what has been presented here, there was a deduction for depreciation aggregating approximately $3,000,000, when you take into consideration the two companies. (2679).

Proceeding from that point on, the Commission brought its valuation up to date, and that valuation, after those prolonged hearings and deliberations, was the fundamental part of the Sliding Scale Arrangement which is here before Your Honor today.

And, may I say to Your Honor, that it is very costly, it is a very time-consuming procedure, and under the law existing it was the only method by which the Commission could properly

enter into a Sliding Scale Arrangement, that being a very material and vital element.

Now, the Commission, in the light of its experience with the Potomac Electric Power Company on the Sliding Scale Arrangement, the so-called Washington plan, called a hearing. "(2680).

* * *

Turning again to the present order, of course the Commission can modify the Sliding-Scale Arrangement, under the determination of this Court, providing it gives timely notice. But, mark you, in a Sliding-Scale Arrangement there are many vital elements. It is the same as throwing a stone into a pool of water; the ripples go to all four corners. And to destroy one without giving due consideration to the others you will have a disjointed proposition which will not function: (2681)

* * *

The truth of the matter is that at the time of entering into the Sliding Scale Arrangement there was something like an $800,000 reduction in rates effected in this jurisdiction. That was the first year. And there have been some other reductions. And this is the first time we find ourselves in a position where under the Sliding Scale Arrangement it becomes necessary that consideration be given to an increase in rates. And Mr. Harrison properly suggests that yearly reduction is, of course, a continuing reduction.

With that state of the record it would therefore seem that the Commission was, of necessity, bound, if any change were to be made, to give timely notice. And, furthermore, to (2682) give, and have before it before making the change, facts upon which such a change could be made.

There has been presented to Your Honor here, and there was presented to the Commission at the time of the hearing, many questions. But I do not believe this Court is going to determine this case on questions presented. (2683).

* * *

Starting in August, even in the preliminary hearing, Mr. Booth participated, and throughout the proceedings he participated, argued, filed briefs, asked for continuances and got continuances, some of which he did not use after he got them.

Nevertheless, he asked for them and the Commission did grant them. So much for the Office of Price Administration.

But by the graciousness of the Public Utilities Commission, who were motivated by an interest in getting the facts which would show the inflationary character of the increase that the company was entitled to, it did permit and it did ask it sought from him evidence which would show that to be the fact, if such it be. But the record is void of any evidence relating to that. The record is replete with attempts to enlarge the scope of the proceeding, to have determined in this proceeding law and rules and regulations, which have not been recognized by the Supreme Court of the United States, a departure from that which had been in effect and which had been beneficial to the public and to the (2694) utilities. That is where the parting of the ways occurred so far as Mr. Booth and the Office of Price Administration are concerned. The Commission sought and was anxious to get that which was intended to be given them by virtue of the Act of October 2, 1942. That is what the Commission did not get. But notwithstanding the absence of that, the Commission found and did hold in certain particulars that there should be adjustments because of the possible effect of an inflationary character. (2695).

* * *

What they wanted to have was a hearing in which all factors could be determined. Of course, that embraced valuation, (2698) rates, depreciation, and everything else. That was not within the scope of the hearing. It was not intended by the Act. (2699).

* * *

Mr. HARRISON. "Chairman Flanagan speaking: "'This Commission will be glad to have testimony regarding the aims and purposes of the Office of Price Administration during this period of national emergency, and we are very much interested in learning the attitude of the Office of Price Administration as to the relation of those aims and purposes to the present proceeding. However, we do not feel that the presentation of such views requires the Office of Price Administration should carry on a double investigation into the accounts of the Gas

Company. This has already been done by our staff, which is competent and experienced.'"

Again, on page 731 of the record of proceedings of September 14th, after having failed all of this time to get (2763) any response to that request, as well as others, Chairman Flanagan again said to Mr. Booth:

"'Mr. Booth, as I have intimated, we are interested in OPA's ideas as to the treatment of income taxes. As to the Sliding Scale Arrangement itself and its terms and the determination as to whether under the terms of that arrangement the company is or is not entitled to a rate increase, as I have repeatedly stated, is one problem. If you are prepared to expand the views of the OPA with respect to said treatment of income taxes, we would be delighted to hear those views.'" (2764).

* * *

Mr. PRETTYMAN. "* * * the Commission declined to retry the valuation case. It declined to adopt another method of computing depreciation, and it declined to retry the rate of return case." (2785)

* * *

Mr. STEVENS. "I wish to address myself for a very few minutes to the proposition that were the Court to set aside this order of the Commission it would level a deadly and staggering blow at the administration of public utility rates in the District of Columbia under the sliding-scale arrangement which is authorized by paragraph 18 of the Public Utilities Act. (2794).

* * *

"Now, I desire to point out to Your Honor that if at the instance of any interested party in any year, that interested party can insist that the Public Utilities Commission go into the classic or orthodox method of fixing rates, then the sliding scale must disappear. The very effort of presenting and trying a full valuation and rate case such as was suggested here would occupy months, first, for preparation, and second for actual presentation of testimony and exhibits. To permit such a thing, to force the Public Utilities Commission at the instance of anybody, to reopen the whole basis of the sliding scale, is to put a premium on interference with the scale whenever it

works in the upward direction and must, it seems to me, nullify the scale itself. (2797).

* * *

"As heretofore stated, this is an arrangement entered into in 1935 either to provide for an increase or decrease in rates, and I submit again, Your Honor, that to force the Public Utilities Commission of the District of Columbia to reopen the sliding scale and to try the classic and orthodox rate and valuation case in each year will effectually prevent the operation of the scale itself, which is, in my judgment, the farthest step that has been made so far to date in this country in an inexpensive and expedient form of rate regulation." (2798)

* * *

The COURT. "Mr. Booth, you have asked an opportunity to (2809) file a brief."

Mr. BOOTH. "It is my thought that it might be helpful to the Court, and yet, of course, as the Court can understand, in view of the importance of the case to our work we thought that a contemporaneous memorandum might be filed by the various parties in about a week's time."

The COURT. "How is that going to help me. Have not all of you stated your positions fully in this record?"

Mr. BOOTH. "I think so, but there have been a great many references to the record and a number of decisions that have been cited, and I think it might be useful if we filed a very short memorandum with the Court within the next five or seven days, depending upon the pleasure of the Court."

The COURT. "I have allowed all of you full time with the idea, primarily, I am going to use the transcript of this record, and if you should repeat over again the things that are already there, it would not be helpful to me. Of course, if there is anything new, I will be glad to have your brief."

Mr. NATHANSON. "Your Honor, we would like to add a word which will not be repetitious."

The COURT. "Let me suggest you avoid repetition. Mr. Reporter, when will you have the transcript?" (2810).

The REPORTER. "Tomorrow."

The COURT. "Does anyone else want to file a brief? I suppose you would like an opportunity to do so if they are going to?"

Mr. PRETTYMAN. "Then we would like to have 48 hours, Your Honor."

Mr. BOOTH. "It was not my thought to file a formal style of brief but only a short memorandum summing up."

The COURT. "Very well."

Mr. PRETTYMAN. "Of course, Mr. Stevens is in New York and we would have to exchange correspondence. We would like to file a reply brief."

The COURT. "Let me suggest the appellants file anything they have to file within one week, or prior to the 31st. Is that time enough?"

Mr. BOOTH. "That is ample time. We may file it sooner than that."

The COURT. "The appellees may have a week in which to reply."

Mr. BOOTH. "That is, a week from the time we receive ours, so if we send it sooner, they will have no more than that." (2811).

The COURT. "Yes. Let me urge you be as brief as you can so as to save as much reading on my part as possible."

Mr. HORSKY. "We will not file a brief, Your Honor."

The COURT. "All of you at times have used copies of the laws, and I should like to have those."

Mr. KEECH. "I shall see that you get those, Your Honor."

The COURT. "We have Judge Byrnes' law and Mr. Henderson's law and the law creating the Public Utilities Commission and these other matters, and it would make it much more easy for me to have those than to have to dig them out."

Mr. KEECH. "I will be glad to see that is done. * * *"

EXHIBITS

EXHIBIT 8

(Rec'd in evidence September 14)

Washington Gas Light Company, Prince Georges Gas Corporation—Comparison of company, Public Utilities Commission accountants', and Office of Price Administration computation of net income available for return in accordance with PUC Order #1458

TEST YEAR ENDED JUNE 30, 1942

	Company	PUC Accountants	OPA
Rate Base	$28,091,461	$28,088,332	$28,088,332
Adjusted Operating Revenues	8,918,656	8,918,656	8,918,656
Operating Expenses:			
Operation and Maintenance	6,002,034	5,970,538	5,970,538
Depreciation	348,070	348,070	
Depreciation (6¼%—43-year sinking Fund on $26,000,000)			120,722
General Taxes	603,996	604,916	604,916
Federal Income Taxes	526,440	494,417	
Federal Income Taxes (see Note (a))			234,848
	7,480,540	7,417,941	6,931,024
Adjustments	71,997	66,545	66,545
Total Adjusted Operating Expenses	7,552,537	7,484,486	6,997,570
Adjusted Net Operating Revenues	1,366,119	1,434,170	1,921,077
6.50% of Rate Base	1,825,946	1,825,742	1,825,742
Defect in Basic Return	459,827	391,572	
Excess in Basic Return			95,335
Amount Available for Rate Increase	383,189	326,310	
Amount Available for Rate Reduction			47,668

Note (a): $\frac{\$494,417}{40} \times 19 = \$234,848.$

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EXHIBIT No. 10

Washington Gas Light Company—Surplus, reserve for depreciation, and dividends declared

Year	Earned surplus, December 31	Depreciation reserve, December 31	Dividends declared
1936	$5,398,927	$879,289	$468,000
1937	5,666,264	1,154,141	520,621
1938	5,142,725	1,418,862	631,071
1939	5,613,350	1,601,292	771,467
1940	6,022,619	1,902,697	879,287
1941	6,271,626	2,171,608	907,538

Source: Washington Gas Light Company, Annual Report to Stockholders.

EXHIBIT No. 11

Washington Gas Light Company—Rate bases, earnings, rates of return, and rates reduction [1]

Test Year Ended	Rate base for the year (weighted)	Net income (return) earned	Rate of return earned	Excessive earnings	Portion of excess earnings to be applied to subsequent rates reductions
			Percent		
June 30, 1936	$21,052,619	$1,460,303	6.94	$91,883	$47,433
June 30, 1937	21,937,559	1,432,217	6.53	6,276	[2] 3,138
June 30, 1938	23,145,728	1,603,208	6.93	98,736	50,492
June 30, 1939	24,119,927	1,866,295	7.74	298,500	[2] 163,575
June 30, 1940	25,218,909	1,766,064	7.00	126,835	[2] 63,417
June 30, 1941	26,282,275	1,579,809	6.01	[3] 128,539	0
Total				493,691	
Average			6.86		

[1] All figures in this table are after allocation to exclude amounts applicable to gas sold for consumption outside of the District of Columbia.

[2] All or a portion of the amounts so designated have been used to partially determine the aggregate amount of rates reductions for a "rates year" later than the immediately succeeding "rates year."

[3] Negative item.

Source: Twenty-eighth Annual Report of the Public Utilities Commission, of the District of Columbia, 1940.

EXHIBIT No. 12

Washington Gas Light Company—Rates of return on average capital employed, company basis

Year	Average capital employed		Income applicable to average capital employed	Rate of return	
	Excluding added appraiser value	Including added appraiser value		On capital employed excluding added appraiser value	On capital employed including added appraiser value
Before deducting Federal income taxes:					
1927	$14,189,521	$21,212,049	$1,375,225	9.7	6.5
1928	14,992,339	22,044,867	1,466,594	9.8	6.7
1929	16,012,500	23,065,028	1,577,170	9.8	6.8
1930	17,174,742	24,227,270	1,561,589	9.1	6.4
1931	18,610,228	25,662,751	2,021,002	10.9	7.8
1932	19,712,043	26,764,571	1,869,492	9.5	7.0
1933	20,212,156	27,264,684	1,855,930	9.2	6.8
1934	22,226,071	29,278,599	1,995,904	9.0	6.8
After deducting Federal income taxes:					
1927	13,818,995	20,871,523	1,237,225	9.0	5.9
1928	14,914,790	21,967,318	1,347,674	9.0	6.1
1929	15,928,581	22,981,109	1,506,436	9.5	6.6
1930	17,100,037	24,152,565	1,484,441	8.7	6.1
1931	18,541,954	25,594,482	1,959,715	10.6	7.7
1932	19,616,662	26,669,190	1,786,014	9.1	6.7
1933	20,096,177	27,148,705	1,798,742	9.0	6.6
1934	22,040,240	29,092,762	1,868,604	8.5	6.4

NOTE.—The appraiser value is the increase in the book value of the company's plants made as the result of independent valuations in 1903 and 1909.

Source: Federal Trade Commission report on Utility Corporations made in response to Senate Resolution No. 83, 70th Congress, Volume 84-1, Page 882.

U. S. GOVERNMENT PRINTING OFFICE: 1943

TUESDAY, MAY 18TH A. D., 1943.

Before Honorable Morris A. Soper, Circuit Judge, sitting by designation, and Honorable Justin Miller and Fred M. Vinson, Associate Justices:

No. 8501

WASHINGTON GAS LIGHT COMPANY, APPELLANT

v.

JAMES F. BYRNES, DIRECTOR OF ECONOMIC STABILIZATION, BY PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8502

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, APPELLANT

v.

JAMES F. BYRNES, DIRECTOR OF ECONOMIC STABILIZATION, BY PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8503

WASHINGTON GAS LIGHT COMPANY, APPELLANT

v.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8504

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, APPELLANT

v.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

On motion of Mr. E. Barrett Prettyman, Mr. Stoddard M. Stevens, Jr., of the Bar of the State of New York, was allowed to appear for appellant in Nos. 8501 and 8503 pro hac vice by special leave of Court, and said appellants were allowed to file printed reply brief.

On motion of Mr. Lloyd B. Harrison, attorney for appellant in Nos. 8502 and 8504, said appellant was allowed to file typewritten reply brief, printed copies to be filed after argument.

Argument commenced by Mr. E. Barrett Prettyman, attorney for appellant in Nos. 8501, 8503, continued by Messrs. Lloyd B. Harrison, attorney for appellant in Nos. 8502, 8504 and Harry R. Booth, attorney for appellee in each case, and concluded by Mr. Lloyd B. Harrison.

United States Court of Appeals for the District of Columbia

April Term, 1943

[Filed June 1, 1943. Joseph W. Stewart, clerk.]

No. 8501

WASHINGTON GAS LIGHT COMPANY, APPELLANT

vs.

JAMES F. BYRNES, DIRECTOR OF ECONOMIC STABILIZATION, BY PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8502

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, APPELLANT

vs.

JAMES F. BYRNES, DIRECTOR OF ECONOMIC STABILIZATION, BY PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8503

WASHINGTON GAS LIGHT COMPANY, APPELLANT

vs.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8504

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, APPELLANT

vs.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

Before: SOPER, Circuit Judge, sitting by designation, and MILLER, Associate Justice

Order

Because of the resignation of Mr. Justice Vinson as a member of the United States Court of Appeals on May 29, 1943, it is ordered by the Court that the above entitled appeals be, and they are hereby, set for reargument on Friday, June 4, 1943, at 2:30 p. m.; argument on each side limited to one hour.

Dated June 1, 1943.

Per curiam.

FRIDAY, JUNE 4TH, A. D. 1943.

Before Honorable D. Lawrence Groner, Chief Justice, and Honorable Morris A. Soper, Circuit Judge sitting by designation, and Honorable Justin Miller, Associate Justice:

No. 8501

WASHINGTON GAS LIGHT COMPANY, APPELLANT

vs.

JAMES F. BYRNES, DIRECTOR OF ECONOMIC STABILIZATION, BY PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8502

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, APPELLANT

vs.

JAMES F. BYRNES, DIRECTOR OF ECONOMIC STABILIZATION, BY PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8503

WASHINGTON GAS LIGHT COMPANY, APPELLANT

vs.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8504

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, APPELLANT

vs.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

Reargument commenced by Mr. E. Barrett Prettyman, attorney for appellant Washington Gas Light Company, continued by Mr. Lloyd B. Harrison, attorney for appellant Public Utilities Commission, by Mr. David F. Cavers, attorney for appellee in each case, by Mr. Harry R. Booth, attorney for appellee in each case, and concluded by Mr. E. Barrett Prettyman, attorney for appellant Washington Gas Light Company.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 8501

WASHINGTON GAS LIGHT COMPANY, APPELLANT,

v.

FRED M. VINSON ~~JAMES F. BYRNES~~, DIRECTOR OF ECONOMIC STABILIZATION, by PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8502

PUBLIC UTILITIES COMMISSION of the DISTRICT OF COLUMBIA, APPELLANT,

v.

FRED M. VINSON ~~JAMES F. BYRNES~~, DIRECTOR OF ECONOMIC STABILIZATION, by PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8503

WASHINGTON GAS LIGHT COMPANY, APPELLANT,

v.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8504

PUBLIC UTILITIES COMMISSION of the DISTRICT OF COLUMBIA, APPELLANT,

v.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

Appeals from the District Court of the United States for the District of Columbia.

Reargued June 4, 1943. Decided July 26, 1943.

Mr. E. Barrett Prettyman, with whom *Messrs. F. G. Awalt, Raymond Sparks* and *C. Oscar Berry* were on the brief, for appellant in Nos. 8501 and 8503. *Mr. Stoddard M. Stevens, Jr.*, of the Bar of the State of New York, who was allowed to appear for appellant in Nos. 8501 and 8503, *pro hac vice*, by special leave of Court, was also on the brief.

Mr. Lloyd B. Harrison, Special Assistant Corporation Counsel, D. C., with whom *Messrs. Richmond B. Keech*, Corporation Counsel, D. C., and *Vernon E. West*, Principal Corporation Counsel, D. C., were on the brief, for appellant in Nos. 8502 and 8504.

Messrs. Harry R. Booth, Utilities Counsel, Office of Price Administration, and *David P. Cavers*, Assistant General Counsel, with whom *Messrs. George J. Burke*, General Counsel, *W. Russell Gorman* and *Howard S. Guttman* were on the brief, for the appellee in each case, and appeared by authority of the Price Administrator.*

Before GRONER, C. J., SOPER, Circuit Judge sitting by designation, and MILLER, Associate Justice.

SOPER, *Circuit Judge*: These appeals are brought to test the validity of an increase in gas rates in the District of Columbia authorized by the Public Utilities Commission of the District but objected to by the Director of Economic Stabilization and his representative in this matter, the Administrator of the Office of Price Administration.

On October 13, 1942 the Public Utilities Commission, one Commissioner dissenting, issued an order whereby an increase of the rates and charges of Washington Gas Light Company for the twelve month period beginning September 1, 1942 was authorized. The order was passed in a proceeding instituted by the Commission on March 20, 1942 for the purpose of adjusting the rate of the company in conformity with a sliding scale arrangement established by the order of the Commission on December 13, 1935 under the Public Utilities Act of the District of Columbia, Section 43-317, D. C. Code, 1940. The Commission then found the rate base as of June 30, 1935, exclusive of working capital, to be $21,000,000 and the fair rate of return to be 6½ per cent. Under the sliding scale plan the accounts of the company have been audited by the Commission annually since 1935 and the rate base has been kept up to date by adding new property at cost and by deducting retired property; and the earnings of the company for each twelve month period ending June 30th have been ascertained so as to fix the rates for the ensuing year beginning on September 1st according to the formula that if the return for the preceding year was greater or less than 6½ per cent, the rates for the ensuing year would be decreased or increased in certain proportions. For example, if the return for the preceding year was between 5½ and 6 per cent, an increase would be made to raise the rate three-quarters of the way up to 6½ per cent.

In operation such a sliding scale plan gradually works towards a rate base valued at cost since additions to the property are recorded at cost; and in periods of continuously rising prices, such as have prevailed since 1935, the plan results in a rate base in each year of less than actual value at that time. In such a period the plan also produces less than the original rate of return fixed by the Commission because estimated expenses for the ensuing year are placed at the level of the year that has just past. In actual experience in the District of Columbia the plan has resulted in reductions in rates for each year in the intervening period, except in 1937 and in 1941 when no changes were made. The calculations made in August, 1942 showed that in the preceding test year the company had earned 4.87 per cent on the rate base. The Commission's accountants reported that under the sliding scale arrangement, disallowing all excess profits taxes, the company was entitled to an increase in rates of $326,000 while the figures presented by the company showed that it was entitled to an

* 7 Fed. Reg. 7910.

increase of $383,000. The order of the Commission authorized an increase of $201,424.74. In other words, the increase allowed was approximately $123,000 less than that indicated by the sliding scale. It is estimated that this increase will permit the company to make a net return of 5.58 per cent on the rate base.

The interest of the Director of Economic Stabilization and of the Administrator of the Office of Price Administration, referred to herein interchangeably as the Price Administrator, grows out of the possible inflationary effect of an increase of gas rates upon an increase of prices generally which Congress sought to check by the passage of the Emergency Price Control Act of 1942 approved January 30, 1942, 56 Stat. 23, 50 U. S. C. A. (App.) § 901 (a) *et seq.* and the amendment thereof by the Inflation Control Act of October 2, 1942, 56 Stat. 50 U. S. C. A. (App.) § 961 *et seq.* That the interest of the Price Administrator in this rate proceeding is legitimate was recognized by the Commission from the beginning, although § 302 (c)(2) of the Price Control Act contains the express provision that "nothing in this Act shall be construed to authorize the regulation of * * * rates charged by any common carrier or other public utility". Counsel for the Price Administrator was present at the pre-trial conference on August 18, 1942 and throughout the subsequent hearings in August and September, and was given full opportunity to participate within the scope of the proceedings fixed by the Commission. The hearings came to a close on September 30, 1942 and, as we have seen, the Commission's decision and order were filed on October 13, 1942. In this order the Commission directed the attention of the company to the following provision contained in the Amendatory Act of October 2, 1942, which had been passed in the meantime:

> "The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: Provided, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State or municipal authority having jurisdiction to consider such increase." (50 U. S. C. A. (App.) Sec. 961.)

By executive order promulgated on October 3, 1942 under this quoted provision of the amendatory Act, 7 Fed. Reg. 7871, the President established the Director of Economic Stabilization and designated him as the agency to receive notice of any increase in public utility rates; and on October 14, 1942, the Director designated the Price Administrator as his representative in proceedings affecting utility rates. On October 14 the company gave the required thirty days notice of the proposed increase to the Price Administrator and he promptly made application that he be allowed to intervene in the proceeding and that the order of the Commission of October 13, 1942 increasing the rate be vacated. The Commission, by order of October 23, 1942, reopened the case for the purpose of receiving from the Price Administrator additional evidence relating to the inflationary

effect, if any, of the increase in rate previously authorized, and granted intervention for this purpose; and the formal consent of the company to the intervention was filed on October 30, 1942. Additional hearings were held on two days at which little change was made in the evidence, and on November 9, 1942 the Commission refused to vacate its order of October 13, 1942. Subsequently, petitions for reconsideration were filed on behalf of the Price Administrator and the Director, and these petitions were denied by the Commission on November 16, 1942. The result was that effect was then given to the order of October 13, 1942, increasing the rates for the twelve month period beginning September 1, 1942, which had been under reconsideration during the reopening of the proceedings. Both the Director and the Price Administrator appealed to the District Court under the provisions of Title 43-705 of the District Code, from the order of October 13, 1942, allowing the increase, and also from the order of October 23, 1942 reopening the proceedings for the limited purpose indicated. The District Court, after hearing, decreed that the order of the Commission be vacated but stayed its judgment pending appeal to this court, upon agreement of the Company to make proper refund to consumers if the decision should be affirmed. Subsequently it appeared that the certified copy of the proceedings before the Commission was not actually before the District Court at the time of its hearing and decision, as contemplated by Title 43-705 of the District Code, and thereupon a motion was filed by the Commission and the Company for a reconsideration of the court's decision, but this petition was denied. The appeals of the Director of Economic Stabilization and of the Price Administrator from both of the orders of the Commission constitute the subject matter now before this court.

Two contentions advanced by the opposing parties to this appeal will first be considered because they go to the form rather than the substance of the controversy and in our opinion are devoid of merit. On behalf of the Price Administrator it is contended that the judgment of the District Court should be sustained because the Commission's order of October 13, 1942 authorizing an increase in the rates was issued after the passage of the Act of October 2, 1942 without complying with the requirements of that Act for prior notice to the President's agency and consent on the part of the Utility to a timely intervention by the agency in the proceeding before the Commission. This recital of facts is correct as far as it goes but it takes no account of the notice served on the Price Administrator on October 14, 1942 or of the reopening of the case and the intervention of the Price Administrator and the opportunity afforded him to be heard during the period ending November 16, 1942 when the reopened proceedings came to an end and the Commission finally determined to stand by its order of October 13, 1942. The notice of October 14, 1942 was thus given thirty days before the final determination of the Commission. Moreover the contention ignores the fact that the amendatory Act brought about no substantial change in the parties to the proceeding, since the Administrator of the Office of Price Administration, who was designated to represent the Director of Economic Stabilization after the passage of the amendatory Act, had been in the proceeding from the beginning and was represented both before and after the passage of the amendment

by the same attorney. Everything that could be said by the Director of Economic Stabilization in opposition to the increase of rates had already been said by the Administrator of the Office of Price Administration throughout the proceeding and was reaffirmed after the intervention of the Director. In short, the contention does not go to the substance of the matter and the provisions of the amendatory Act requiring prior notice and consent to intervention by the Presidential agency were complied with.

On the other hand, a contention of the Commission and of the Company that the decree of the District Judge should be reversed because he did not have the record of the case before the Commission physically before him at the time of his decision is also without substantial merit. It is based upon Title 43-705 of the District Code that any appeal from a decision of the Commission shall be heard upon the record before the Commission, and that no new evidence shall be received. Reliance is also placed upon decisions which hold that there is an absence of due process if the judgment of a court is not based upon a consideration of the record. Morgan v. United States, 298 U. S. 468, 304 U. S. 1. We think it is clear, however, that the material parts of the record were in effect brought to the attention of the District Judge at the time of the hearing and before his decision was rendered. There is in fact no contention that he was not substantially advised of the merits of the controversy from the briefs and arguments of counsel. Moreover, it appears that he made a close examination of the record when the motion to reconsider the decision was before him and found nothing therein to alter the opinion which he had already reached. Under these circumstances it is obvious that the objection is formal rather than substantial, and that no good purpose would be served by remanding the case to the District Judge for further consideration.

The important issue in the case turns upon the action of the Commission in confining the rate investigation to an application of the sliding scale to prevailing conditions and a consideration of the possible inflationary effect of a price increase, and in refusing a demand of the Price Administrator that a thorough going examination be made into the rate base, the rate of return, operation expenses and depreciation, and all other matters relative to the establishment of a fair return. The position of the Price Administrator is based in part on his interpretation of the price control statutes and in part upon his contention that he was denied the full rights of an intervenor to which he was entitled under the amendatory Act.

With respect to interpretation* the Price Administrator contends, on the strength of a clause contained in Section 1 of the amendatory

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* The particular provisions of the Emergency Price Control Act of January 30, 1942, and of the Amendatory Act of October 2, 1942, which are interpreted herein, are as follows:

ACT OF JANUARY 30, 1942.

Section 1. (a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited

Act, that the powers of the Commission to regulate utility rates in the District of Columbia was cut down and restricted by the amendment so that the Commission can now grant an increase in utility rates only to the extent that it finds it "necessary to aid in the effective prosecution of the war or to correct gross inequities". In deciding this question consideration of course must be given to the underlying salutary purpose of the original Act as shown in Section 1

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incomes, consumers, wage earners, investors, and persons dependent on life insurance annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. * * *

Section 2 (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have arisen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 * * * for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ending October 1, 1941. * * *

Section 302 (c) * * * Provided, That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility * * *.

ACT OF OCTOBER 2, 1942.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: Provided, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase.

Sec. 2. The President may, from time to time, promulgate such regulations as may be necessary and proper to carry out any of the provisions of this Act; and may exercise any power or authority conferred upon him by this Act through such department, agency, or officer as he shall direct. The President may suspend the provisions of sections 3 (a) and 3 (c) and clause (1) of section 302 (c) of the Emergency Price Control Act of 1942 to the extent that such sections are inconsistent with the provisions of this Act, but he may not under the authority of this Act suspend any other law or part thereof.

Sec. 7 (c) Nothing in this Act shall be construed to invalidate any provision of the Emergency Price Control Act of 1942 (except to the extent that such provisions are suspended under authority of section 2), or to invalidate any regulation, price schedule, or order issued or effective under such Act.

"to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering * * *; * * * to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors * * * from undue impairment of their standard of living; * * * to assist in securing adequate production of commodities and facilities". It is also necessary to give proper weight to the cognate purpose of the amendatory Act as shown by Section 1 thereof to supplement and further effectuate the purpose of the original Act and to aid in the effective prosecution of the war by enlarging the power of the President and authorizing him to issue a general order "stabilizing prices, wages and salaries, affecting the cost of living"; such stabilization "except as otherwise provided in this Act" to be as far as practicable "on the basis of the levels which existed on September 15, 1942". The subsequent period was taken care of by giving the President power "except as otherwise provided in this Act" thereafter to "provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities". This grant of power is subject to the proviso that no public utility "shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increases".

The contention of the Price Administrator is that this section first gives the power to the President to stabilize all prices, including utility rates, on the levels existing on September 15, 1942, and then sets up a definite standard for subsequent adjustments; and that the proviso merely alters the method whereby increases in utility rates may be made, by taking the power away from the President and giving it to the Commission, but retains the standard which must be applied to all increases whether authorized by the President or the Commission. This construction, however, is seen to be strained and unnatural when all the relevant provisions of the original Act and of the amendatory Act are taken into consideration. In the first place, it is noteworthy that the standard specified in § 1 of the amendatory Act as the necessary basis for a price increase, that is, the furtherance of the war or correction of gross inequities, is set for the guidance of the President and not for the regulatory agencies. To find their governing standards recourse must be had to the statutes creating them and outlining their powers. Congress had in mind in passing the original Act that utility rates are subject in the District of Columbia and almost everywhere else to the control of regulatory bodies and are therefore not exposed to "speculative, unwarranted, and abnormal increases." Accordingly Congress provided in § 302 (c) of the Act "that nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees or (2) rates charged by any common carrier or other public utility, * * *".

In contrast with this limitation is the power conferred upon the Price Administration by § 2 (a) of the original Act to establish the

maximum price of a commodity which has risen or threatens to rise to an extent inconsistent with the purposes of the Act, giving due consideration to the prices prevailing between October 1 and October 15, 1941, and the further power to make subsequent adjustments for relevant factors, including speculative fluctuations, general increases or decreases in cost of production, etc., during the year ending October 1, 1941. It is obvious that utility rates were excluded from the subject matter over which the Price Administrator was given broad powers of control in the original Act.

It is equally clear that the power of regulatory bodies to fix utility rates was left unchanged by the amendatory Act except that the designated agency of the President was given the right to intervene and to be heard in any rate proceeding before any increase in rate in force on September 15, 1942 could be made effective. Power was given to the President to stabilise prices at the levels of September 15, 1942 "except as otherwise provided by this Act"; and power was also given him to make adjustments thereafter if he should find it necessary to expedite the war or correct inequities "except as otherwise provided in this Act". The other provisions, to which these exceptions relate, include Section 2 of the amendatory Act wherein the President was given power to suspend the provisions of Section 3 (a) and Section 3 (c), and clause 1 of Section 302 (c) but was denied authority to suspend any other law or part thereof. Also relevant to these exceptions is Section 7 (c) which expressly provides that nothing in the Act shall be construed to invalidate any provision of the original Act except to the extent that such provisions may be suspended under the authority of Section 2. As we have seen, clause 302 (c) of the original Act forbad the regulation of (1) compensation paid by an employer to his employees and (2) rates charged by any public utility. For our purposes it is especially significant that although the President was given power to nullify the prohibition against the regulation of wages contained in the original Act the power to nullify the prohibition in that Act against the regulation of utility rates was denied him.

No room is left for the argument that the standard applicable to price regulation by the President after September 15, 1942 was also imposed upon regulatory commissions generally and upon the Public Utilities Commission of the District of Columbia in particular. If such had been the purpose of Congress there is no good reason why it failed to express it, especially as the powers of the Commission had already been fixed by Congress itself in the Public Utility Act of the District of Columbia, and repeals by implication are not favored. Even more persuasive is the proviso in Section 1 of the amendatory Act, which is the only part of the Act that expressly refers to public utilities and increases in rates over those in effect on September 15, 1942. This proviso clearly recognized the power of the Public Utilities Commission of the District of Columbia and other regulatory bodies to fix utility rates, and leaves this power undisturbed except that it imposes upon utilities seeking an increase the duty to give thirty days notice to the President's agency, and to consent to its timely intervention before any general increase in rate in effect on September 15, 1942 can be made in a rate pro-

ceeding. A corollary of this duty of the Utility is of course the duty of the regulatory body to accord the intervenor a fair hearing.

The legislative history of the amendatory Act of October 2, 1942 supports this conclusion. When the bill was before the Senate, Senator Norris submitted an amendment which was adopted by the Senate that provided that rates charged by a public utility should not be increased without the consent of the President. But this amendment was rejected when the bill went into conference, and the proviso in § 1 of the Act as it now stands was substituted. When the conference report was returned to the Senate the subject was discussed at length by Senator Norris and certain interchanges took place between him and Senator Brown during the debate. The latter is party to the pending appeal in his capacity as Administrator of the Office of Price Administration. It clearly appears from their remarks that the senators understood that the opportunity afforded the President's representative to intervene in a rate hearing did not confer upon him the power to participate in the decision or to control the proceeding, but merely the right to show that an increase in rates would tend to increase the cost of living and thereby impair the stabilizing effect of the government's price regulation, with the right of appeal where the Commission's action is reviewable by the courts. In short, as Senator Norris expressed it, the Act conferred no technical relief but only a great moral effect which would flow from an unwarranted opposition of a regulatory commission to the efforts of the Price Administrator to check inflation. See 88 Cong. Rec. 155, 7443, 7877-8, 7901, 7971, 7973, *et seq.*

It will be perceived that this interpretation gives effect to the proviso in that it preserves the power of the regulatory body, while exposing it to the public appeal of a government official charged with the administration of an act of Congress designed to protect the welfare of the entire nation. The record in this case shows that the intervention of the Price Administrator was not without influence or effect. The Commission was not oblivious to the economic conditions consequent upon the war and did not disregard them in formulating its findings and opinion. It pointed out that its responsibilities were twofold, that is, to determine what increase, if any, the company was entitled to under the sliding scale for the ensuing year and also to give recognition to the existing economic situation and the ability of the company to finance needed plant extension and render adequate service to consumers at the nation's capital. The intervention and assistance of counsel for the Price Administrator were noted, and findings, supported by substantial evidence, were made to the following purport and effect:

The Commission's accountant computed that the company was entitled under the sliding scale to a rate increase of $324,718.06, while the company's accountants computed that the increase should be $381,597. The difference between these amounts was caused by certain adjustments of operating expenses and taxes made by the Commission's accountant, which the Commission adopted. The Commission, however, did not allow even the full amount of the increase indicated by its accountant's calculation, but deducted the additional sum of $123,293.32, making the net increase $201,424.74.

This result was accomplished (except for the deduction of one negligible item) by including accruals for federal income taxes at the rate of 31 per cent for the last six months of the test year ending June 30, 1942, instead of 40 per cent as provided by the sliding scale. On this point the Commission said:

> "However, present-day conditions compel us to consider whether accruals for Federal income taxes at rates considerably higher than rates in effect in previous years should be allowed in their entirety for rate-making purposes. Much has been said recently regarding the allowance of Federal income taxes on a normal-year basis rather than on the basis prevailing in a so-called 'abnormal year.' Our difficulty here lies in the necessity for making a distinction between normal and abnormal taxes. It is true that rates of taxation imposed during the year 1941 and proposed for the year 1942 are substantially in excess of rates imposed in prior years. However, it requires very little imagination to foresee that the proposed rate for 1942, while such rate is abnormal as compared with the rates in effect in prior years, may well be a normal or even a subnormal rate for some years to come. After weighing all factors to the best of our ability, we conclude that for the purpose of determining the amount available for rate increase for the rate year beginning September 1, 1942, the calculation of Federal income taxes for the test year under consideration (July 1, 1941, through June 30, 1942) at the rate of 31% is reasonable. Such a calculation will result in a further decrease of $115,863.09 in adjusted operating expenses and will eliminate the adjustment of $4,929.39 to provide for increase in taxes under the provisions of Section 6 of the sliding scale arrangement.
>
> With respect to excess profits taxes, we are of the opinion that no increase in rates should be predicated upon the liability of a utility for excess profits taxes. For this reason we have disallowed as an operating expense for the test year ended June 30, 1942 the excess profits tax of $43,928.02, in order to prevent the direct inflationary effect which such allowance would invite.
>
> The record indicates that the Company will not be liable for excess profits tax for the year 1942*. * * *"

The Commission gave especial attention to the financial condition of the company and its need for additional capital. In this respect it said:

> "There is still another and very important problem for consideration, namely the financial position of the Company and particularly its ability to secure capital economically for the purpose of extending its plant to meet the growing demands for gas service. We must weigh the necessity for an increase

* The Commission eliminated from operating expenses excess profits taxes paid by the company for the year 1941 although it recognized the equity of a contention of the company that it would not have been liable for these taxes if the Commission had been in a position to act promptly on its application for the issuance of additional preferred stock in 1941 to which reference is hereafter made.

in rates against the broad problem of adequate service. Low rates are desirable only when coupled with adequate service, and such service cannot be rendered by the Company if it is unable to secure funds to provide the necessary additional facilities. The District of Columbia has been characterized as the No. 1 defense area of the United States, and it is vital that the Company be in a position at all times to provide adequate service.

It is a matter of record that the Company recently attempted to sell 40,000 shares of $5.00 cumulative preferred stock, but was successful only to the extent of being able to sell 18,206 shares of this stock. This was due to a number of factors and a recitation of events and facts preceding and subsequent to the offering of this stock shows that the financial position of the Company merits our most serious consideration.

On January 17, 1941, the Company filed an application with this Commission for authority to increase its capitalization by 90,000 shares of $4.25 preferred stock. Due principally to the lack of a quorum on the Commission this application was not acted upon until March 26, 1942 (Order No. 2221). At that time, due to depressed market conditions, the Company was unable to sell this newly created stock and endeavored to sell 40,000 shares of its $5. cumulative preferred stock with the result heretofore stated. In approving the sale of the $5.00 stock the Commission considered, among other factors, the financial position of the Company as of December 31, 1941. At that time income deductions and preferred dividends were earned 1.88 times, and the earnings per share of common stock were $2.24. Our order was issued April 21, 1942, and income for the twelve months ended April 30, 1942, showed that income deductions and preferred dividend coverage had declined to 1.75 times, while earning per share of common had declined to $1.96. For the twelve months ended July 31, 1942, the former figure had declined to 1.67 times and the latter to $1.80. This decline in income is not due entirely to increased provision for Federal income taxes. Substantial increases in the cost of labor and material have occurred during the period under discussion, and such increases have been provided for only in part in the determination of the amount available for rate increase. Labor costs included in operating expenses for the test year under consideration exceed labor costs for the prior test year by more than $300,000, a part of which was attributable to the increased volume of business."

Finally, after careful consideration of all factors having a bearing on the case, including the credit position of the Company, the Commission reached the opinion that there should be an increase in rate of $201,424.74 under the sliding scale arrangement. In respect to the potential inflationary influence of this increase the Commission said:

"This increase in rates will not restore the earnings of the Company to the level obtaining prior to the decline, nor is it the intent of the sliding scale arrangement to do so. It will, however, tend

to arrest the decline and preserve the principles inherent in the sliding scale arrangement, on which, as heretofore stated, the credit position of the Company depends in large measure."

• • • •

"The new domestic rates will result in an average increase of $.03 per month per customer. Domestic customers using 2,500 cubic feet or less per month will sustain no increase. Space heating customers' monthly bills for the eight-month heating season will be increased an average of $.57 for all customers. The typical space heating customers' bills will be increased by $.72 per month for the eight-month heating season. The average increase for commercial and industrial customers will amount to $.46 per month. The total increase for all customers is 2.28% in excess of rates for the preceding year."

"The cost of gas constitutes but 1.17% of the average cost of living in Washington, according to statistics of the Labor Department, and based on the percentage increase for gas service just stated the cost of living index would be increased by only 1/37 of 1%. We cannot conceive that such an increase would have material inflationary tendencies."

Manifestly, the order of the Commission was issued only after a deliberate and careful study of the factors affecting the business of the utility in wartime Washington without a trace of hasty or arbitrary conduct on the Commission's part. The findings of such an administrative agency, where there is evidence to support them, may not be set aside by the courts; Swayne & Hoyt Ltd. v. United States, 300 U. S. 297, 304; Norfolk & Western Ry. Co. v. United States, 287 U. S. 134; American Telephone & Telegraph Company v. United States, 299 U. S. 232; and in this case the findings of the Commission in the application of the sliding scale are not seriously disputed. Indeed the Commission did not give the Utility all the advantage to which the sliding scale entitled it. Thus, the Commission allowed accruals for income taxes at the rate of 31 per cent although the sliding scale provided for an allowance of 40 per cent; and this reduction cost the company $123,000 in revenue for the ensuing year. Moreover, substantial increases in the cost of labor and material, common to all kinds of business during the war, were compensated for only in part in determining the increase of rates allowed, so that it was held down to the sum of $200,000. The conservatism of this action is demonstrated by the finding of the Commission, based on convincing evidence, that the company could not finance its needs and install the extensions required to fill the demands of the "No. 1 Defense Area of the United States", unless the decline in earnings was arrested and the principles of the sliding scale arrangement, on which the credit position of the company depended, were preserved. Viewed from this standpoint, it becomes clear that the intervention of the Price Administrator was not in vain. Indeed it would be difficult to say that the Commission did not comply with the standard imposed by the amendatory Act upon the adjustment of prices other than utility rates, that the adjustment be found "necessary to aid in the effective prosecution of the war or to correct gross inequities". Certainly the risk of such inflation as might be expected to follow from

increase of 1/37 of 1 per cent in the cost of living in the District Columbia was amply justified.

The principles of the sliding scale were the subject of careful consideration when it was proposed by the People's Counsel and accepted the utility in 1935. Acceptance by the utility was necessary since e statute, District Code Title 43-306, required that the Commission alue the property of a utility at its fair value and the sliding scale rangement eventuates in the course of time in a cost valuation. itle 43-317 permits a public utility to adopt a sliding scale of rates nd dividends, if it is found by the Commission to be reasonable and ust. Such an arrangement involves the basic elements of rate making, ncluding a rate base, a fair rate of return and a correct determination f revenues, expenses and depreciation; and in its operation, capital dditions and retirements as well as revenues and expenses are subect to constant supervision and control of the Commission.

In the case of the Washington Gas Light Company, as we have seen, he system has brought about a reduction in rates in each year since 935, except 1937 and 1941 when no change was made. All additions o the property have been entered at cost, and in the period of rising rices the gap between the present value of the property and the ate base allowed under the scale has widened. Likewise, the estiated expenses based in each year on the expenses of the preceding ear have proved too small, and the rate of return has fallen to 4.87 er cent instead of 6½ per cent allowed in 1935. Meanwhile, the benfit of economies has been transferred to the consuming public, and he accumulation of a cash reserve by the company to meet the growng demands of the community has been precluded. It was under hese circumstances that the Commission held that the need for an ncrease of rates was imperative, and that the sliding scale should be pplied as it had been in previous years when it brought about a decrease in rates.

The District Judge in his consideration of the case found no fault with the propriety of the sliding scale or the manner in which it has heretofore been applied by the Commission; but he held that the scale should now give way in deference to the Congressional policy expressed in the Price Control Statutes. On this point he said:

> "The sliding scale arrangement is not a contract, certainly not one which binds the public. It must give way to public policy and to Congressional enactment which expresses that policy. The Commission in good faith has sought to fulfill its obligations under the sliding scale arrangement but may have lost sight of the check upon it which has been voiced by Congress. I am not unmindful that the effort and the cost in bringing about the sliding scale arrangement was very great. I think it was the result of fair and honest judgment and has been found to be a good workable and economical plan, but it must now be subjected to a test not previously required."

In view of the new statutes the judge concluded that it had become the duty of the Commission, upon the request of the Price Administrator, to reconsider the basic principles of the sliding scale, and that when the Commission refused to undertake this task, its action was "arbitrary and illegal". As to the scope of the investigation demanded by the Price Administrator the judge said:

"The Price Administrator claims that notwithstanding he was permitted to intervene the Commission nullified the permission by refusing to reconsider the basic principles of the sliding scale arrangement in the light of the economic conditions and the Government's program to prevent inflation. Appellants contend that by its rulings and pronouncements it limited its consideration to such data as would enable it to apply the formula of the sliding scale arrangement in determining what rates were authorized by the sliding scale arrangement."

There can be no doubt that the judge correctly stated the position of the Price Administrator as demanding a full and exhaustive examination into the rate base, the rate of return, the operating expenses and method of depreciation, and all other elements that usually enter into a utility rate investigation by a regulatory commission. In his brief in this court the Price Administrator said:

"* * * It (the Commission) was under a legal duty to exercise the full measure of its statutory powers to prevent an increase in utility rates. It was, therefore, incumbent upon the Commission to reconsider all basic elements of the sliding-scale arrangement. Only by doing so could the Commission find whether the Company would be subjected to undue hardship if a rate increase was denied, or whether the increase was necessary to cure a gross inequity or to aid in the prosecution of the war."

During the course of the hearing before the Commission, there was much informal discussion and many subjects were touched upon; but the most precise and comprehensive statement of the attitude of the Price Administrator as to the scope of the investigation is contained in the following statement then made by his attorney:

"* * * We must be given the right to examine every issue which the courts have held enters into the making of fair and reasonable rate regardless of the terms of sliding-scale arrangement or previous conclusions by the Commission that a rate increase is justified. If we are to comply with applicable judicial principles affecting the question of fair and reasonable rates, we must have the right to go into at least the following factors:

(1) What is a proper rate base? And on that point an inquiry should be made and promptly as to why the rate base should not be predicated upon the original cost of the Company property. Why should the rate payers be compelled to pay increase rates upon a rate base largely in excess of the original cost of the Company's property?

(2) What are fair operating expenses of the company? Here the question of depreciation expense is a serious problem as far as the public is concerned since accrued depreciation was not deducted from the rate base.

(3) What are other proper operating expenses? Here the minority opinion by Commissioner Hankin must be given fair and adequate consideration.

(4) What are proper income taxes to be allowed or should the Company's customers pay its war taxes?

(5) What is a fair rate of return for this Company in the light of current economic conditions.

It must be of course clear that a full and complete inquiry for the purpose of determining what are fair and reasonable rates, must be made in order that the Commission may comply with its duty under the law * * *".

In respect to each of these matters the Price Administrator asserted that the Company was receiving an undue advantage under the sliding scale. For example, he said that the rate base was overvalued and should be revalued at original cost; that even without adjustment on the basis of the sliding scale the Company would earn a return of 5 per cent in the ensuing year, which was sufficient under wartime conditions; that the method of computing retirement accruals contained in the sliding scale was more favorable to the Company than an annual allowance for depreciation such as was approved (for a business of limited life) by the Supreme Court in Power Commission v. Pipeline Co., 315 U. S. 575; that the Commission should not consider the 31 per cent income tax of 1941 as a normal pre-war tax and permit the Company to deduct it as an operating expense; and that other expense allowances were excessive.

All of these matters were discussed at great length during the extended hearings before the Commission. They were offered as reasons which, taken together, required a complete rate investigation. Indeed all of the subjects were so tied together that no substantial change could be made in one without a survey of the entire field. The Price Administrator made no definite offer of proof in connection with these matters; indeed, he was in no position to do so, as he had not made the laborious calculations and studies that a thorough rate investigation necessarily entails. What he desired was an indefinite postponement of any increase in rates pending an exploratory investigation by the Commission in which he was willing to assist as best he could. As he said in his brief in this court:

> "In the proceeding before this Commission, OPA and OES sought to enlighten the members of the Commission as to this program and the need for wholehearted support of the Commission. We also sought to explore with the Commission the factors to be considered in determining what the Company's earnings have actually been and what they probably will be. We also sought to show that the change in economic conditions which had taken place since 1935, when the sliding-scale arrangement was made, required the Commission to take the appropriate steps to reconsider the arrangement."

In furtherance of this object the Price Administrator requested that the Commission undertake a revaluation of the Company's rate base by applying a method that is in conflict with the provisions of Title 43-306 of the District Code wherein it is provided that the Commission shall value the property of every public utility in the District at the fair value thereof at the time of the valuation. In disregard

of this governing statute the Price Administrator makes the following statement in his brief in this court:

> "Nevertheless, appellees have not requested the making of a valuation of the property of appellees. The Government's view is that the rate base in utility rate cases is to be arrived at by taking the original cost or the prudent investment of the property with appropriate consideration for accrued depreciation. We have not sought a revaluation of the Company's property in the sense that it is necessary for the Commission or the Company to make reproduction cost appraisals. All we have said is that it should be necessary in determining the need of the company for a rate increase for the Commission to determine whether it would be unfair to limit the Company's return to original cost with due consideration to the proper treatment of depreciation in line with the Supreme Court's decisions."

In its essence, the question raised in this aspect of the case is whether the Commission, as the regulatory body, or the Price Administrator, as intervenor, should control the scope of the investigation. We do not think that the mere right to intervene in a rate proceeding conferred upon the Price Administrator by the Act of October 2, 1942, includes the power to compel the regulatory body to undertake a complete rate investigation against its better judgment, much less an investigation upon lines contrary to the governing statute. The power and authority to fix reasonable, fair and just rates for utilities in the District of Columbia was conferred by Congress upon the Commission, District Code Title 43-401. To this end the Commission is empowered to make rules and regulations for the administration of the Act, for audits and investigations, and for the conduct of its own proceedings and hearings. Title 43-202, 43-402. It may, in its discretion, proceed with or without notice upon its own initiative or upon reasonable complaint "to make such investigation as it may deem necessary or convenient". Title 43-408. The Act is carefully drawn in considerable detail and expressly provides that it shall be interpreted and construed liberally in order to accomplish the purposes thereof. Title 43-1003.

It is not reasonable to suppose that Congress intended to abrogate or repeal the powers so carefully elaborated by giving the Price Administrator the right to compel a complete overhauling of the established practice of the Commission and the adoption of a new and different standard, when experience had shown that the prevailing practice was adequate to secure the objective of adequate service with a fair rate of return on the utility's investment. The power to fix rates is a legislative power which has been delegated by Congress to the Commission and in its exercise within constitutional limits the discretion of the Commission may not be controlled even by the courts. The utility itself cannot compel an investigation and a change of rate that is not confiscatory in the constitutional sense. Nor can the rate making body be confined to any particular standard or method in the field of its discretion. That which was said of the Federal Power Commission in Power Comm'n. v. Pipeline Co., 315 U. S. 575, 586, is equally true of the Public Utilities Commission of the District of Columbia. The court said:

"The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end."

It must be borne in mind that there was no refusal on the part of the Commission to receive evidence with regard to the inflationary effect of an increase of rates. On the contrary the Commission expressed a desire to hear the Price Administrator and urged him to present any evidence in his possession on this point. Moreover, the Commission gave heed to present day conditions by reducing the allowance which the sliding scale would have justified and at the same time ordered a small increase in rates in order to buttress the financial condition of the Company and enable it to satisfy the abnormal demands upon it. The conflict arose when the Price Administrator departed from the field committed to his care and demanded that the Commission suspend the application of the sliding scale, and reexamine its basis in a complete investigation of all the elements that enter into the determination of a utility rate by a regulatory body.

The investigation leading to the adoption of the sliding scale in 1935 required three and a half years for its completion and cost $750,000; and it is obvious that the kind of inquiry that the Price Administrator now demands could not be made without great expense of time and money. Our conclusion is that the refusal of the Commission to undertake such an investigation at this time, and in the meantime to ignore the reasonable needs of the company, was not arbitrary or illegal, but was well within its lawful discretion.

The judgment of the District Court will be reversed and the cases remanded with instructions to dismiss the appeals from the Commission's orders.

Reversed and Remanded.

MILLER, *Associate Justice, dissenting:* I think the decree of the District Court should be affirmed. The decision of this case does not turn upon the power of courts to interfere with the findings and determination of regulatory bodies, or upon the findings and determinations made by the Commission in the present case. The questions are (1) whether full intervention was permitted and a fair hearing given within the meaning of the applicable statute; (2) whether a rate increase was made contrary to the requirement of the statute.

Making full allowance for the fact that the Inflation Control Act of October 2, 1942,[1] represented a compromise between contending

[1] 56 Stat. ——, 50 U. S. C. A. (App.) Sec. 961 *et seq.*

factions in Congress—as most legislation does—nevertheless some substantial purpose must have been intended to be served by inclusion therein of the provision "That no common carrier or other public utility *shall make any general increase* in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction *to consider such increase.*"[2] [Italics supplied]

In the first place, this proviso clearly defines the issue which is to be tried by the authority having jurisdiction of the case in which intervention is required, namely, whether or not the public utility "shall make any general increase in its rates." The issue is not whether an increase shall be made pursuant to an arrangement theretofore agreed upon, or upon notice theretofore given, or upon terms theretofore defined, or in such an investigation as may be deemed "necessary or convenient" by the authority. The issue is simply and plainly, *shall an increase be made.* The trial of no lesser issue, however arrived at, can satisfy the requirement of the statute. Limiting the Administrator's intervention to the application of a sliding-scale formula previously adopted, therefore, defeated the purpose of the Act.

It is the duty of courts in interpreting statutes to avoid absurd results. Whatever may have been said in explanation of an act, its plain language cannot be disregarded. To limit the effect of the present Act to "the right to show that an increase in rates would tend to increase the cost of living and thereby impair the stabilizing effect of the government's price regulation," would reduce it to an absurdity. It is a matter of common knowledge that increases in rates tend to increase the cost of living. The Commission might well be expected to take notice of the fact. Intervention and fair hearing would not be necessary to make such a showing. If no more had been intended by the Act it could have been so indicated therein without requirement of notice or intervention.

Neither is the only alternative to such a purposeless intervention, "the power to *participate in the decision* or to *control the proceeding.*" It is reasonable to suppose that Congress intended an intervention of the usual character. Intervention in a trial court does not contemplate participation in the decision; neither does it give to the intervenor power to control the proceeding. But it does contemplate that the court may be required to try the issues contemplated by the applicable laws; it empowers an intervenor, just as any other party, to insist upon compliance with the law and to challenge, in an appellate court, the failure of the trial court to do so. No less was intended here.[3]

Considerable reliance is placed upon the provisions of the District Code defining the powers of the Commission. It is argued that experience has shown the prevailing practices of the Commission to be adequate to secure proper service and a fair rate of return, hence that it is not reasonable to suppose Congress intended to limit the powers originally conferred upon the Commission; especially as re-

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[2] 56 Stat. ——, 50 U. S. C. A. (App.) Sec. 961.

[3] *Cf.* Federal Communications Commission v. National Broadcasting Co., decided May 17, 1943, 11 U. S. Law Week 4385.

peal by implication is not favored. In *Henderson* v. *Washington, Marlboro & Annapolis Motor Lines, Inc.*,[4] this Court said, concerning the Inflation Control Act of October 2, 1942: "But, apart from all statutes existing prior to October 2, 1942, and all orders, rules and regulations made pursuant to those statutes, the Act of October 2, 1942, is conclusive of the issue presented for our decision. As it was enacted subsequent to the Interstate Commerce Act it supersedes that Act, to whatever extent may be necessary to achieve its own purposes. Its clearly expressed purpose was to stabilize prices, wages and salaries affecting the cost of living, upon the basis of the levels which existed on September 15, 1942." This language is equally applicable in the present case. On June 9, 1943, Judge Sibley, speaking for the Fifth Circuit Court of Appeals,[5] held that Section 265 of the Judicial Code, forbidding the grant of an injunction by a court of the United States to stay proceedings in a state court must be considered modified by the later provisions of the Emergency Price Control Act. The present case involves much less difficulty. The Commission is a creature of Congress; its powers are derived from legislation enacted by Congress; there is no question of policy to be surmounted, in interpreting the earlier statutes in such manner as to secure their conformance to the purposes of later acts. While repeals by implication are not favored, repeals by implication do occur. When, as here, a new law is designed to achieve a clear purpose, it must be respected; and inconsistent procedures, previously existing must be disregarded. Consequently the rules adopted by the Commission governing its procedure and the shaping of issues have no vitality as against the requirement of the Act of October 2, 1942, that intervention must be permitted, or against any legal implications which flow from that requirement. From then on, it is not a question of the Commission or the Price Administrator controlling the proceedings. It is the *law* which controls the proceedings and if the Commission does not comply with the law, the Price Administrator's duty is to challenge its failure to comply; and ours to uphold the challenge.

Neither is it material to the decision of this case that the Commission *reduced the allowance* which the sliding scale would have justified. The important fact is that the Commission *allowed an increase of rates*. If that allowance was made without granting full intervention and a fair hearing within the meaning of the applicable statute then the action of the Commission was improper and the decision of the District Court should be affirmed. With all deference to the majority, there *was* a refusal by the Commission to permit full intervention and to receive evidence with regard to the inflationary effect of an increase in rates. Only to the extent that offered evidence assumed the validity and unimpeachability of the sliding-scale arrangement, would the Commission receive it. Upon the same theory the Commission denied the Administrator's request to examine the Company's books and records. And upon the same theory the Commission refused to permit inquiry concerning the validity of the basic assumptions of the sliding-scale arrangement.

An argument of convenience is made upon the theory that compliance with the Administrator's demand for intervention and hear-

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[4] 132 F. (2d) 729, 732, cert. denied April 5, 1943, —— U. S. ——.

[5] Henderson (Brown) v. Fleckinger, 5 Cir., —— F. (2d) ——, 11 U. S. Law Week 2879.

ing would have required "a complete rate investigation," "a survey of the entire field," "the laborious calculation and studies that a thorough rate investigation necessarily entailed," "a complete investigation of all the elements that enter into the determination of a utility rate by a regulatory body". Attention is called in this connection to the fact that the investigation leading to the adoption of the sliding scale in 1935 required three and a half years for its completion and cost $750,000. It is asserted that the kind of inquiry that the Administrator now demands could not be made without great expense of time and money. I do not so read the record. What the Administrator asked was merely a reconsideration of the *basic principles* of the sliding-scale arrangement in the light of present economic conditions and the Government's program to prevent inflation; namely, what is a proper rate base; what are fair and proper operating expenses; what account should be taken of depreciation; what are proper income taxes to be allowed; what is a fair rate of return for the Company in the light of current economic conditions? There was no suggestion that the great mass of information gathered prior to 1935 was not equally available for present purposes. There was no objection to the introduction by the Commission of other available material in its files, just as is done by the Interstate Commerce Commission and by other regulatory authorities.

It is significant in this respect that the Commission, itself, went back of the sliding-scale arrangement in its allowance of an increase of rates. If, as is contended, an inquiry into the basic principles of a sliding-scale arrangement necessarily requires a three year investigation, at a cost of $750,000, how does the Commission explain its disregard of the sliding-scale arrangement in allowing accruals for income taxes at the rate of 31 per cent, although the sliding scale provided for an allowance of 40 per cent? Some basic principle of the arrangement must have been violated by that action. In short, my conclusion is that this argument about a large scale, expensive, time-consuming investigation, was advanced by the Commission and supported by the Company as camouflage to hide their unwillingness to permit *any* inquiry which did not assume and admit the infallibility of the sliding-scale arrangement. And I conclude that, whatever the proper limits of inquiry may have been, the Commission fell far short of them in the present case. The Commission and the Company apparently assume that only two alternatives were open (1) to proceed as the Commission specified in its original order of March, or (2) to enlarge the proceeding to permit a complete reinvestigation of every element, of fact as well as of principle, involved in the original sliding-scale arrangement. There were, instead, at least two other alternatives, (1) to permit no increase in rates until the war is over, as a matter of policy; (2) to permit the Price Administrator to present such evidence as he deemed proper[6] concerning any phase of the matter; then, in deciding the case, to use, if the Commission pleased, the records of the earlier investigation, the sliding-scale arrangement and other of its pertinent records, compiled by its experts—and properly introduced as evidence. This could probably have been easily

[6] In the *Henderson* case, 132 F. (2d) 729, 732, we said: "... the new Act ... permits timely intervention by the Price Administrator ... followed by such appropriate showing as he may wish to make."

done in the time which was actually consumed, at the hearing, in contending over the scope of the intervention and the issues to be tried. In any event, I agree with the District Court that: "The sliding scale arrangement is not a contract, certainly not one which binds the public. It must give way to public policy and to Congressional enactment which expresses that policy. ...it must now be subjected to a test not previously required."

It is suggested that the increase in rates, granted by the Commission in the present case, is very small, both in total and in their effect upon individual consumers. It is argued also that utility rates are not exposed to "speculative, unwarranted and abnormal increases," hence that Congress did not intend to apply to the guidance of regulatory authorities the wartime standards of the Inflation Control Act. I cannot follow this reasoning. Because Congress chose to retain *regulation* in authorities already existing, rather than placing it in the hands of the President, cannot explain away the fact that such rates were brought within the compass of the Act. There is no reason why the *standards* applicable in the one case should be inapplicable in the other. So far as concerns the minimal character of the rate increases I am content to adopt the language of Judge Vinson in the case of *Lincoln Savings Bank of Brooklyn* v. *Prentiss M. Brown* (decided May 7, 1943) when speaking for the United States Emergency Court of Appeals, concerning the contention that the Price Act contemplated regulation only of those commodities, the prices of which substantially affect the cost of living, he said: "It is true that an increase in complainant's prices, in and of itself, does not substantially affect living costs. Complainant's statement is correct, so far as it goes, but it is deceptive in its intended inference that, for that reason, no purpose is served by the regulation of safe deposit rental rates. Accession to this type of reasoning would virtually destroy the effectiveness of the Act. Complainant's argument is applicable to thousands of commodities besides its own. Clearly, however, *the collective effect of so many increased prices could create the very chaotic condition that the Act was designed to prevent.* It is plain to us that there is compelling reason to restrain the complainant and others in its class from making their *individually inappreciable contributions* to what would result in a very appreciable total." [Italics supplied]

The Administrator suggests the following possible construction of the proviso to the second sentence of Section 1 of the Inflation Control Act: (1) "And such regulatory authority, in determining whether to grant or deny the increase, may give such effect, if any, to the national stabilization program as it may deem appropriate;" (2) "And such regulatory authority, in determining whether to grant or deny the increase, shall give effect to the national stabilization program;" (3) "And such regulatory authority, in determining whether to grant or deny the increase, shall grant the increase only if, and to the extent, it finds the increase necessary to aid in the effective prosecution of the war or to correct gross inequities." I agree with the Administrator that the third suggested construction is correct. The monopoly character of public utilities; the absolute dependence of the people upon them for service; the complicated structure of their holdings and their financing; these and other similar considerations are the very ones which caused the development of great

federal, state and local regulatory agencies. It is because such agencies are well equipped to supervise and regulate, that Congress decided to preserve their control, rather than to throw a greatly increased burden upon war-time, emergency agencies such as the Price Administrator. But that decision does not by any means require the conclusion that these regulatory agencies were not to consider the existence of a war-emergency or apply the war-time standards which are implicit in the Act of October 2, 1942. It was, undoubtedly, the duty of the Commission to consider the financial condition of the Company, its ability to serve the Washington area, and its ability to refinance itself. It is, also, undoubtedly the duty of the President, the Price Administrator and other appropriate governmental agencies to consider the financial condition of other industries, of agricultural interests, of wage earners and of men selected for military service. The exigencies of war make it necessary, however, to impose controls which would not be proper during peace time.

When young men are giving their lives by thousands, when the normal economy has given way to the necessities of war, when industrial organizations, great and small, have been converted to war production or perhaps destroyed,[7] it seems to me that a curious lack of identification with our national emergency and our national effort is required, to continue speaking in terms of normal arrangements and peace-time formulae. It is true, as the history of this legislation shows, that it is a compromise. But the significant thing is that the disputed proviso was incorporated, at all, into the Act of October 2, 1942. If the intention of Congress had been to leave regulation of the utilities by existing agencies solely according to pre-war standards, it was not necessary to say anything about them in this Act. Of course it is possible to find language in legislative history which will support either side of a bitterly contested issue upon which a compromise is finally reached. Perhaps each proponent and opponent hopes that when the courts come to interpret their compromise language, the interpretation will fall his way. As previously stated, however, our task is to read the Act in such manner as to avoid an absurd result and to give it meaning, in the light of its expressed over-all purpose. There can be no doubt of that purpose in the present case. It was certainly not the intention of the lawmakers to leave these regulatory bodies, or the utilities, free of concern for the war-time welfare of the Country, to do business "as usual" according to such sliding-scale arrangements, designed for peace-time, depression-ridden Washington, as are involved in the present case.

The Commission's order of October 13, 1942, specified that the new, increased rates became effective on *September 1, 1942*, under the terms of the sliding-scale arrangement. On October 14, the Company gave notice to the Price Administrator, but in that notice specified that the effective date of the increase was *September 1, 1942*; in its order of October 23, 1942, the Commission specified again that the effective date of the increased rates was *September 1, 1942*, and it permitted intervention for the receipt of evidence concerning the increase in rates authorized by its order of October 13, 1942; on October 30, 1942,

[7] See for an example of such possibilities, Perkins v. Lukens Steel Co., 310 U. S. 113, and Lukens Steel Co. v. Perkins, 70 App. D. C. 354, 107 F. (2d) 627.

the Company consented to intervention; in its order of November 9, 1942, the Commission recited that intervention had been permitted for the purpose of receiving evidence bearing on the increase authorized by its order of October 13; on November 16, 1942, it denied the Administrator's petition for reconsideration. On the record of the Commission, therefore, its order of October 13, 1942, still stands; the increase in rates is effective as of September 1, 1942. The Act provides that no increase in rates which were in effect on September 15, 1942, shall be made unless the utility, "*first* gives thirty days notice ... and consents to the timely intervention. . . ." [Italics supplied] In my opinion the increase, made in this case, was in clear violation of the law, entirely apart from the merits of the case.

A study of the record, particularly as interpreted in the opinion of Commissioner Hankin, suggests that when the time comes to consider the case on the merits, some of the findings and conclusions of the Commission will not stand careful scrutiny. But those questions are not before us. The decree of the District Court is clearly correct, on questions of procedure alone, and should be affirmed.

United States Court of Appeals for the District of Columbia

April Term 1943

[Filed July 26, 1943. Joseph W. Stewart, clerk.]

No. 8501

WASHINGTON GAS LIGHT COMPANY, APPELLANT

v.

JAMES F. BYRNES, DIRECTOR OF ECONOMIC STABILIZATION &c., APPELLEE

No. 8502

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA APPELLANT

v.

JAMES F. BYRNES, DIRECTOR OF ECONOMIC STABILIZATION, APPELLEE

No. 8503

WASHINGTON GAS LIGHT COMPANY, APPELLANT

v.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8504

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, APPELLANT

v.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

Appeals From the District Court of the United States for the District of Columbia

Judgment

These appeals came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and were argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in these causes be, and the same is hereby, reversed, and that these causes be, and they are hereby, remanded to said District Court with instructions to dismiss the appeals from the Commission's orders.

Per Mr. Chief Justice Groner.

July 26, 1943.

Dissenting opinion by Mr. Justice Miller.

United States Court of Appeals for the District of Columbia

April Term, 1943

No. 8501

WASHINGTON GAS LIGHT COMPANY, APPELLANT

v.

JAMES F. BYRNES, DIRECTOR OF ECONOMIC STABILIZATION BY PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8502

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, APPELLANT

v.

JAMES F. BYRNES, DIRECTOR OF ECONOMIC STABILIZATION BY PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8503

WASHINGTON GAS LIGHT COMPANY, APPELLANT

v.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8504

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, APPELLANT

v.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

Order

On consideration of motion of Fred M. Vinson as Economic Stabilization Director to be substituted as party appellee herein in the place and stead of James F. Byrnes, Director of Economic Stabilization, resigned, it is ordered by the court that Fred M. Vinson, as Director of Economic Stabilization, be, and he is hereby, substituted in No. 8501 and in No. 8502 as party appellee in the place and stead of James F. Byrnes, Director of Economic Stabilization, resigned.

Dated August 11, 1943.

Per curiam.

United States Court of Appeals for the District of Columbia
[Filed Sept. 9, 1943. Joseph W. Stewart, clerk.]

No. 8501

WASHINGTON GAS LIGHT COMPANY, APPELLANT

v.

FRED M. VINSON, DIRECTOR OF ECONOMIC STABILIZATION, BY PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8502

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, APPELLANT

v.

FRED M. VINSON, DIRECTOR OF ECONOMIC STABILIZATION, BY PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8503

WASHINGTON GAS LIGHT COMPANY, APPELLANT

v.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8504

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, APPELLANT

v.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

Designation of record

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Appendices to briefs of the parties.
2. Minute entry of argument.
3. Opinion.
4. Judgment.

5. Order of substitution of party appellee. (Authority of Mr. Booth).
6. This designation.
7. Clerk's certificate.

FRED M. VINSON,
Director, Office of Economic Stabilization,
PRENTISS M. BROWN,
Administrator, Office of Price Administration.
By GEORGE J. BURKE,
George J. Burke,
General Counsel,
DAVID F. CAVERS,
David F. Cavers,
Assistant General Counsel,
HARRY R. BOOTH,
Harry R. Booth,
Utilities Counsel,
Legal Department, Office of Price Administration.

Certificate of Service

I hereby certify that I have this day served a copy of the foregoing Designation of Record on each of the following:

E. Barrett Prettyman, Esq., 822 Connecticut Avenue N.W., Washington, D. C. Attorney for the Washington Gas Light Company.

Richmond B. Keech, Corporation Counsel and Lloyd B. Harrison, Assistant Corporation Counsel, District Building, Washington, D. C. Attorneys for the Public Utilities Commission.

by mailing a copy thereof addressed to each such party.

HARRY R. BOOTH,
Attorney for Appellees.

Dated at Washington, D. C., this 8th day of September 1943.

United States Court of Appeals for the District of Columbia

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered from 1 to 451, both inclusive, constitute a true copy of the appendices to the briefs of the parties and the proceedings of the said Court of Appeals as designated by counsel for appellees in the cases of:

No. 8501

WASHINGTON GAS LIGHT COMPANY, APPELLANT

vs.

FRED M. VINSON, DIRECTOR OF ECONOMIC STABILIZATION, &c., APPELLEE

No. 8502

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, APPELLANT

vs.

FRED M. VINSON, DIRECTOR OF ECONOMIC STABILIZATION, &c., APPELLEE

No. 8503

WASHINGTON GAS LIGHT COMPANY, APPELLANT

vs.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8504

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, APPELLANT

vs.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

April Term, 1943, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this fourteenth day of September, A. D. 1943.

JOSEPH W. STEWART,
Clerk of the United States Court of Appeals,
for the District of Columbia.
By C. PRESTON GAINOR,
Assistant Clerk.

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In the Supreme Court of the United States

October Term, 1943

FRED M. VINSON, DIRECTOR OF ECONOMIC STABILIZATION, BY PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, PETITIONER

v.

WASHINGTON GAS LIGHT COMPANY

FRED M. VINSON, DIRECTOR OF ECONOMIC STABILIZATION, BY PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, PETITIONER

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, PETITIONER

v.

WASHINGTON GAS LIGHT COMPANY

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, PETITIONER

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA

Stipulation

Subject to this Court's approval, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that for the purpose of the Petition for a Writ of Certiorari, the printed record may consist of the following:

1. Volume I, Appendix to briefs of respondents in the United States Court of Appeals for the District of Columbia.

2. Volume II, Appendix to briefs of petitioners in the United States Court of Appeals for the District of Columbia, together with proceedings had in that court.

It is further stipulated that any of the parties may refer in petition and briefs to the original transcript of record filed in this Court, and that if the petition for certiorari is granted, the printed record shall consist of the proceedings in the court below and such portions of the original transcript of record as the parties may designate.

CHARLES FAHY,
Solicitor General, Counsel for Petitioners.

Dated this 10th day of September 1943.

LLOYD B. HARRISON,
E. BARRETT PRETTYMAN,
Counsel for Respondents.

Dated this 13th day of September 1943.

Supreme Court of the United States

Order allowing certiorari

Filed November 8, 1943

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

In Supreme Court of the United States

Stipulation as to record

Filed Nov. 26, 1943

It is hereby stipulated and agreed by and between the attorneys for the above named parties that the record filed in this Court with the petition for certiorari may be used in the hearing of this case on the merits and that no further printing is necessary. It is further stipulated that any of the parties may refer in briefs and argument to the original transcript of record filed in this Court.

CHARLES FAHY,
Solicitor General,
Counsel for Petitioners.
E. BARRETT PRETTYMAN,
LLOYD B. HARRISON,
Counsel for Respondents.

Dated this 26th day of November 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1944